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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-573

ROBERT L. JOHNSON, Superintendent

and

DISTRICT ATTORNEY OF PHILADELPHIA COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

WILLIAM MATTHEWS, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ____

ROBERT L. JOHNSON, Superintendent

and

DISTRICT ATTORNEY OF PHILADELPHIA
COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

WILLIAM MATTHEWS, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner Commonwealth of Pennsylvania respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on August 15, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, is set out as Appendix B. The unreported opinion of the District Court for the Eastern District of Pennsylvania, adopting and incorporating the Re-

port and Recommendation of the United States Magistrate, is set out as Appendix C. The opinion of the Supreme Court of Pennsylvania, reported as *Commonwealth v. Matthews*, 446 Pa. 65, 285 A.2d 510 (1971), is set out as Appendix D.

JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on August 15, 1974. A petition for rehearing with permission for oral argument was filed with leave of court and was denied on September 19, 1974. This petition for certiorari was filed within ninety days of the original order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment require state trial courts, upon request, to instruct the jury on the lesser included offense of voluntary manslaughter in all cases, including felony-murder cases, even where there is *no evidence whatever* to reduce the degree of the crime below murder in the first degree?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment Fourteen, Section One.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

William Matthews, respondent herein, was convicted of the first degree murder of Randolph Butts, who died as the result of knife wounds sustained when assaulted and robbed as he left an apartment building in Philadelphia. Respondent was sentenced to life imprisonment.

Respondent filed a direct appeal with the Supreme Court of Pennsylvania. In that appeal, he asserted as one of his several grounds for relief that the trial judge erred in refusing a specific request to submit voluntary manslaughter to the jury as a possible verdict. On December 29, 1971, the Pennsylvania Supreme Court affirmed the judgment of sentence, with two justices dissenting. *Commonwealth* v. *Matthews*, 446 Pa. 65, 285 A.2d 510 (1971).

Respondent next filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. On March 5, 1973, the United States Magistrate issued a Report and Recommendation in which he reviewed each of respondent's claims, and concluded that he was entitled to relief because the trial judge refused to submit voluntary manslaughter to the jury as a possible verdict. He further concluded that all other claims were without merit. On April 3, 1973, the Honorable John Morgan Davis issued an order approving and adopting the Report and Recommendation of the magistrate and granting the petition for writ of habeas corpus. *United States ex rel. Matthews* v. *Johnson* (April 3, 1973 C.A. 73-159) (unreported).

The Commonwealth appealed,[1] and the case was argued before a panel of the United States Court of

[1] No appeal was taken by respondent from the District Court's order denying relief on other grounds.

Appeals for the Third Circuit. The Court, *sua sponte*, ordered rehearing *en banc*, providing also that the case was to be submitted without oral argument. On August 15, 1974, the Court of Appeals affirmed the order of the District Court, *United States ex rel. Matthews* v. *Johnson*, ___ F.2d ___ (3d Cir. August 15, 1974). The Commonwealth's petition for rehearing with permission for oral argument was denied by the Court *en banc* on September 19, 1974.

REASONS FOR GRANTING THE WRIT

I. The decision below is in conflict with decisional law enunciated by this Court.

In affirming the District Court's grant of a new trial to respondent, the Court of Appeals held that:

> We believe that the safeguards of due process will be satisfied only when all defendants in Pennsylvania murder trials are given the same opportunity, upon request duly made, to have a jury return a verdict of voluntary manslaughter as well as first and second degree murder.

Appendix B at p. 28 (footnote omitted).

The Court of Appeals based this holding on three grounds:

1. Juries in Pennsylvania are vested with the *power* to return a manslaughter verdict on any murder indictment.

2. Where juries have exercised that power, it has been upheld, even in cases in which the evidence supported only first degree murder.

3. At the time of Matthews' conviction and appeal[2] Pennsylvania law vested the determination as to

[2] The Pennsylvania Supreme Court has since changed the rule pursuant to its supervisory powers. See Section III, *infra*.

whether to give the charge in the sound discretion of the trial judge. The trial courts were given no hard and fast guidelines with respect to the exercise of that discretion, except the rule that the charge *was required* where there was *any* evidence tending to reduce the crime to manslaughter, but *was not required* where there was no such evidence.

This holding is in direct conflict with *Sparf* v. *United States*, 156 U.S. 51 (1895). There, this Court specifically rejected the claim raised by Matthews in the court below. Mr. Justice Harlan observed:

> [I]n this case, it was competent for the court to say to the jury that, on account of the absence of all evidence tending to show that the defendants were guilty of manslaughter, they could not, consistently with law, return a verdict of guilty of that crime.
>
> * * * * *
>
> To instruct the jury in a criminal case that the defendant cannot properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offenses that might, under some circumstances, be included in the one so charged—there being no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular offense charged—is not error; for the instructing or refusing to instruct, under the circumstances named, rests upon legal principles or presumptions which it is the province of the court to declare for the guidance of the jury.

Id. at 101, 103.

Nevertheless, the Court of Appeals attempted to distinguish *Sparf* by stating:

> The Supreme Court in *Sparf* [was] confronted with issues of statutory construction only.

Appendix B at p. 28.

This Court in *Sparf*, however, described the issue presented as being one of Constitutional dimension:

> Briefly stated, the contention of the accused is that, although there may not have been any evidence whatever to support a verdict of guilty of an offense less than the one charged, —and such was the case here,—yet, to charge the jury, as matter of law, that the evidence in the case did not authorize any verdict except one of guilty or one of not guilty of the particular offense charged, was an interference with their legitimate functions, and therefore with the constitutional right of the accused to be tried by a jury.

Sparf, supra, at 99.

The principles underlying its holding have not been eroded over the years and, indeed, have been reaffirmed. *Berra* v. *United States*, 351 U.S. 131 (1956); *Sansone* v. *United States*, 380 U.S. 343, 349-50 (1965); *Keeble* v. *United States*, 412 U.S. 205 (1973).

II. The decision below is in conflict with decisions and principles of law enunciated by the Courts of Appeals of other circuits as well as the vast majority of State Supreme Courts.

The opinion below is squarely in conflict with settled law in the District of Columbia Circuit, which has held that a manslaughter charge is not required where wholly unsupported by the evidence. In *Belton* v. *United States*, 382 F.2d 150 (D.C. Cir. 1967), that court observed:

We agree with counsel that an accused is entitled to an instruction on manslaughter if there is "any evidence fairly tending to bear upon the issue of manslaughter," however weak, and that the court may not intrude on the province of the jury which may find credibility in testimony that the judge may consider completely overborne by the "simply overwhelming" evidence of the prosecutor . . . . And there may be "some evidence" of a lesser offense even though this depends on an inference of a state of facts that is ascertained by believing defendant as to part of his testimony and prosecution witnesses on the other points in dispute.

Here there was no testimony "fairly tending" to bear on manslaughter—i.e. fairly tending to show that deceased unjustifiably assaulted appellant with a gun, he wrested the gun from her control, and then shot her in the heart . . . . [This is] a case where the charge requested was objectionable as based on speculation without foundation in the evidence.

* * * * *

We suggest that where the issue is close, the request of defense counsel may properly be given the benefit of the doubt. The danger of giving the jury a power to make punishment lenient (by downgrading the offense) is offset in part by the discretion available to the trial court on sentencing. And it is appropriate to take into account the strain on judicial administration resulting from the need for retrial if the position of the trial court is not sustained on appeal. But even such an approach presumes that the trial court will be reasonably alerted to the factual predicate underlying the instruction requested. Here the testimony did not "fairly tend" to bear on

> manslaughter, and we cannot assign reversible error to the failure of the trial court to glean and array on its own motion the strained possibilities of events put forward by counsel who have mulled over the appeal, but not advanced at trial either by defense counsel or the witnesses.

Id. at 155-56 (footnotes and citations omitted). See also, *Fuller* v. *United States*, 407 F.2d 1199, 1228-29 (D.C. Cir. 1968), *United States* v. *Comer*, 421 F.2d 1149, 1153-55 (D.C. Cir. 1970). A manslaughter instruction is not required where the facts do not support such a verdict although the jury has the clear power to bring in a lesser offense conviction even where the evidence shows only first degree murder, and such a verdict will not be upset on appeal if exercised. See, e.g., *Owens* v. *United States*, 58 F.2d 685 (D.C. Cir. 1932); *Goodall* v. *United States*, 180 F.2d 397 (D.C. Cir. 1950).

In addition to the Court of Appeals for the District of Columbia, forty state courts have held that a manslaughter charge is not required where unsupported by any evidence. A listing of these states, and the state court cases so holding, is set forth as Appendix E.

The holding below also conflicts in principle with the law of several other circuits. Thus, in *United States* v. *Markis*, 352 F.2d 860 (2d Cir. 1965), a gambling tax case, Judge Friendly observed:

> The lesser-included offense charge is not required simply because the jury could exercise its power of acquitting on the greater charge for no reason at all "in the teeth of both law and facts." Horning v. District of Columbia, 254 U.S. 135, 138, 41 S. Ct. 53, 54, 65 L. Ed. 185 (1920); there must be a rational basis for its doing so. Precisely

> this, we think, is the distinction between Sparf v. United States, 156 U.S. 51, 63-64, 15 S.Ct. 273, 39 L. Ed. 343 (1895), and Stevenson v. United States, supra, 162 U.S. at 315, 322-323, 16 S. Ct. 839, 40 L. Ed. 980, both cited by the Court with apparent approval in the recent cases of *Berra* and *Sansone*.

Id. at 867.

In *Driscoll* v. *United States*, 356 F.2d 324 (1st Cir. 1966), another wagering tax decision, the First Circuit held:

> We take *Sansone* to mean that when the government has made out a compelling case, uncontroverted on the evidence, on an element required for the charged offense but not for the lesser-included offense, there is a duty on defendant to come forward with some evidence on that issue if he wishes to have the benefit of a lesser-included offense charge. To put it another way, while a judge cannot prevent a jury from rejecting the prosecution's entire case, he is not obligated, under these circumstances, to assist a jury in coming to an irrational conclusion of partial acceptance and partial rejection of the prosecution's case by giving a lesser-included offense instruction. Two prerequisites seem vital: that there be no factual dispute and that a finding contrary to the only evidence on the issue would be irrational.

Id. at 327. *Accord, United States v. Enos*, 453 F.2d 342 (9th Cir. 1972) (assault and battery with a deadly weapon); *MacIlrath* v. *United States*, 188 F.2d 1009 (D.C. Cir. 1951) (assault and battery with a dangerous weapon).

While this case deals with the power of juries to reach a verdict for an unsupported lesser offense "in the teeth of the evidence,"[3] juries also possess—and sometimes exercise—the power to render an outright acquittal inexplicable save that they are overcome by sympathy, or else are deaf, dumb and blind. Upon occasion defense counsel have pressed trial judges to inform the jury that they may acquit if they believe the defendant was morally justified even though guilty under the law. For obvious reasons, no appellate decisions have been reported where the trial court acquiesced in such a request. The trial court's refusal, however, has been noted by several Courts of Appeals with emphatic and uniform affirmance. For instance, in *United States* v. *Simpson*, 460 F.2d 515 (9th Cir. 1972), it was said:

> The "conscience verdicts" which result from exercise of this power often involve juries in the task of judging both law and fact. Even though facts may logically compel conviction under the law, we suspect that acquittal has nevertheless occasionally followed a jury's rejection of stated legal principles. This is a disturbing recognition, for in most courts, including those in the federal system, such decisions conflict with the principle that "it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence." Sparf and Hanson v. United States, 156 U.S. 51, 102, 15 S. Ct. 273, 293, 39 L.Ed. 343, 361 (1895); *see Moylan, supra*, 417 F.2d at 1005-1007.
>
> However, as long as general verdicts are rendered in criminal cases, certain verdicts that may

[3] *Horning* v. *District of Columbia*, 254 U.S. 135, 138 (1920).

be reasonably thought to rest upon the juror's rejection of the law will occur. They cannot be detected, since the courts "cannot search the minds of the jurors to find the basis upon which they judge." *Moylan, supra,* at 1006. *See, also* United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968). We acknowledge the truth that all such verdicts, especially when viewed in hindsight, cannot reasonably be said to have been undesirable.

The basic question here is whether justice would be better served by instructing jurors as Simpson requested and thus opening the way for more "conscience verdicts." We think not. We agree with the decision in *Moylan* that the rule set forth in *Sparf* and *Hanson* remains correct.

Id. at 519 (footnote omitted). And in *United States* v. *Dougherty,* 473 F.2d 1113 (D.C. Cir. 1972), it was noted:

The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge. Most often commended are the 18th century acquittal of Peter Zenger of seditious libel, on the plea of Andrew Hamilton, and the 19th century acquittals in prosecutions under the fugitive slave law. The values involved drop a notch when the liberty vindicated by the verdict relates to the defendant's shooting of his wife's paramour, or purchase during Prohibition of alcoholic beverages.

Even the notable Dean Pound commented in 1910 on positive aspects of "such jury lawlessness."

* * * * *

> When the legal system relegates the information of the jury's prerogative to an essentially informal input, it is not being duplicitous, chargeable with chicane and intent to deceive. The limitation to informal input is, rather a governor to avoid excess: the prerogative is reserved for the exceptional case, and the judge's instruction is retained as a generally effective constraint.
>
> • • • • •
>
> In the last analysis, our rejection of the request for jury nullification doctrine is a recognition that there are times when logic is not the only or even best guide to sound conduct of government.
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> • • • • •
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> What makes for health as an occasional medicine would be disastrous as a daily diet. The fact that there is widespread existence of the jury's prerogative, and approval of its existence as a "necessary counter to case-hardened judges and arbitrary prosecutors," does not establish as an imperative that the jury must be informed by the judge of that power.

Id. at 1130, 1135, 1136. *Accord, United States* v. *Moylan,* 417 F.2d 1002 (4th Cir. 1969); *United States* v. *Dellinger,* 472 F.2d 340, 408 (7th Cir. 1972); *United States* v. *Boardman,* 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied,* 397 U.S. 991 (1970).

Thus, other Circuits have, on a closely analogous issue, recognized that the delicate balance of law and mercy which we term justice derives its strength from the very flexibility and defiance of formulation that characterizes jury behavior. The key to this balance is necessarily vested in the trial court and its instructions. It was precisely this recognition which

the court below found offensive in the opinions of the Pennsylvania Supreme Court.

III. The decision below presents serious problems to the orderly administration of justice in Pennsylvania and throughout the Circuit.

On May 2, 1974,[4] the Pennsylvania Supreme Court decided *Commonwealth* v. *Jones*, — Pa. —, 319 A.2d 142 (1974), holding:

> We therefore, under our supervisory power, rule that henceforth a defendant under indictment of murder will be entitled, *upon request*, to have the jury advised of its power to return a verdict of voluntary manslaughter.

Id. at —, 319 A.2d at 148.

The decision of the Court of Appeals nonetheless presents several serious problems both in Pennsylvania and in the other jurisdictions within the Third Circuit.

The Supervisory Rule

Of course, the most obvious such difficulty is that the Pennsylvania Supreme Court cannot now retract their new procedural rule if it proves unsatisfactory in practice. The charge if forced upon the trial judge in an inappropriate case may prove confusing, and might actually mislead the jury. It was observed that "[T]welve men can easily misunderstand more law in a minute than the judge can explain in an hour." *Skidmore* v. *Baltimore & Ohio R. Co.*, 167 F.2d 54, 60 (2d Cir. 1948). Indeed, when a prior practice has proven problematical, supervisory rule-making powers can be used to see if a new practice will rectify the difficulty. Yet there is no guarantee that the new rule

[4] While the instant case was pending in the Court of Appeals.

will not create new—and perhaps worse—problems of its own. If that occurs, the new rule can be rescinded or modified. However, by finding such a rule to be Constitutionally mandated, the Court of Appeals has locked the Pennsylvania courts into the new procedure whether it proves workable or not. This difficulty is at the moment somewhat speculative; the other problems which follow are more immediate and serious.

Prior Murder Convictions in Pennsylvania

In its decision, the Court of Appeals refused to decide the issue of retroactivity. However, three members of the Court were persuaded that the issue should be determined, so the opinion of the Court discussed the issue in dictum. It is clear that the Court felt that two alternatives were available: completely retrospective application, and application only to cases pending on direct appeal. Either of these courses threatens to unsettle numerous first and second degree murder convictions. Considering only persons in prison or on parole supervision[5] as of October 15, 1974, 1640 persons are presently in custody in Pennsylvania on first or second degree murder convictions. Of these persons, 682 have exhausted their rights to a direct appeal.[6] Under Pennsylvania law, if a direct-appeal type retroactivity were decided upon, the ruling would apply to the remaining 956 prisoners and parolees by way of a *nunc pro tunc* direct appeal. *Commonwealth* v. *Linde*, 448 Pa. 230, 293 A.2d 62 (1972); *Commonwealth* v. *Heard*, 451 Pa. 125, 301 A.2d 870 (1973) (applying *Mapp* v. *Ohio*, 367 U.S. 643 (1961) to 1958 and 1956 convictions, respec-

[5] According to statistics provided by the Pennsylvania Bureau of Corrections and the Pennsylvania Board of Probation and Parole.

[6] According to dockets of the Pennsylvania Supreme Court.

tively)[7]; *Commonwealth* v. *Johnson*, 451 Pa. 528, 304 A.2d 139 (1973) (applying *Massiah* v. *United States*, 377 U.S. 201 (1964) to a 1946 conviction).[8] The *nunc pro tunc* direct appeal is a common device in Pennsylvania, often mandated by *Douglas* v. *California*, 372 U.S. 353 (1963), but which is virtually granted for the asking. During the years 1971—(November) 1974, 907 cases were listed pursuant to petitions filed under the Pennsylvania Post Conviction Hearing Act, Pa. Stat. Ann. tit. 19 § 1180 *et seq.* (1974). Of these, 195 petitioners were granted the right to file a direct appeal *nunc pro tunc* (21.5%). It is impossible to ascertain of the bulk of these petitions how many had already taken direct appeals, how many had pled guilty so that right to a direct appeal would be meaningless,[9] and how many of the remainder even *requested* the right. However, of the 264 cases in which opinions were written during this period, 60 requested the right. Eighteen of these requests were meaningless, either because the petitioner had plead guilty or *nolo contendere*, or because he had already taken a counselled direct appeal. Of the 42 remaining requests, 35 were granted (58.3% of the total requests) and only 7 denied, where a clear waiver of appellate rights appeared from the record. It is thus clear that a *Linkletter*-type retroactivity would threaten a far greater number of cases than the 294 *presently pending* on direct appeal.

Of course, regardless of the type of retroactivity chosen, only those cases in which the charge was re-

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[7] Under the authority of *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

[8] Under the authority of *McLeod* v. *Ohio*, 378 U.S. 356 (1965).

[9] Because following a guilty (or *nolo contendere*) plea, appellate rights are limited to issues fully cognizable on collateral attack. *United States ex rel. Black* v. *Russell*, 435 F.2d 546 (3d Cir. 1970); *Commonwealth* v. *Ward*, 442 Pa. 351, 357, 275 A.2d 92 (1971).

quested and denied would be affected by the decision below.[10] Manpower and time limitations have precluded examination of more than a sampling of records. Nonetheless, the statistics thus compiled can give the Court some notion of the magnitude of cases affected. Of the 294 murder convictions *presently pending* before the Pennsylvania Supreme Court, 129 are Philadelphia County convictions listed for the November, 1974, argument session. Of these, 80 records were examined. (The remainder were guilty-pleas, non-jury trials or unavailable records).[11] Of the 80 records examined, 12 defendants requested the charge and were refused. (In another 7 cases, the instruction was not given and a general exception was taken to the charge.) Thus, of the 107 available records, 11.2% of the total cases and 15% of the actual jury trials would be overturned as a result of the decision below.[12]

Projecting these statistics into the data concerning the number of persons in custody, the operative figure is 11.2%, since it is not clear how many of the 1640 murder convictions were non-jury dispositions. On this basis, it would appear that approximately 184 persons would have to be re-tried under a rule of complete retroactivity. If a direct-appeal, or *Linkletter*-type retroactivity were decided upon, two categories of persons would be entitled to relief. First, of the 294 murder convictions *presently pending* in

[10] This is not to deny, however, the inevitable deluge of frivolous litigation by persons who never requested the charge, and ineffective assistance claims against attorneys who did not request the charge.

[11] 27 were non-jury dispositions; 22 were unavailable files on jury trials.

[12] Additionally, jury trials were reviewed which are presently pending post-trial motions in Philadelphia County following convictions for first and second degree murder. 45 such records were available for examination. Of these, 5 would require new trials (11.5%).

the Supreme Court of Pennsylvania, 11.2% or approximately 33 convictions would be overturned. In addition, another 21.5% of the persons in custody would be able to obtain a direct appeal *nunc pro tunc* or 353 persons. Of these, then, approximately 40 would obtain new trials. Thus a total of approximately 73 murder convictions would be upset under a *Linkletter*-type rule.

An alternative method of calculating the number of *nunc pro tunc* appeals which might be affected is to estimate that of the 956 persons in custody who have not exhausted direct appeal rights, 11.2% or 107 will be entitled to a new trial *if* they appeal. Assuming that these persons will request the right to a *nunc pro tunc* direct appeal, approximately 58.3% will be granted the right upon request, or 62 persons. Adding this to the 33 estimated new trials arising from the cases *presently pending* before the Pennsylvania Supreme Court, an estimated 95 convictions would be overturned.

Other Jurisdiction Within The Circuit

While the Court of Appeals purported to limit its holding and analysis to the Pennsylvania practice, the other jurisdictions in the Circuit appear to have essentially the same rule. (See Appendix E). Indeed, in 1971, another Habeas Corpus petitioner in the United States District Court in New Jersey raised the same due process issue upon which respondent was granted relief. The New Jersey petitioner's claims were denied, and no appeal was taken. *United States ex rel. Victor v. Yeager*, 300 F.Supp. 802 (D. N.J. 1971). In a direct appeal from a Virgin Islands murder conviction, appellant claimed that the district court erred in refusing to charge on manslaughter. The Court of Appeals in that case held that there was

no right to the charge since the evidence did not support a manslaughter verdict. *Virgin Islands* v. *Carmona*, 422 F.2d 95 (3d Cir. 1970). Nevertheless, in the decision below, the Court distinguished its prior holding by saying that *Carmona* was concerned with statutory construction only, and that the due process issue had not been presented in the earlier case.

Thus the decision below leaves both state and federal courts with great uncertainty concerning the validity of the rules and practice in effect in Delaware, New Jersey, and the Virgin Islands. A great deal of litigation is certain to arise in those jurisdictions before the confusion created by the decision below is dissipated. By accepting review, this Court can foreclose needless litigation and eliminate uncertainty and confusion in these jurisdictions.

Other Types of Lesser Included Offenses

A problem similar to the one discussed above is that although the holding below was limited to requiring a manslaughter charge in a murder indictment, there is no basis in precedent or logic for drawing a distinction between the murder/manslaughter question and lesser included offense instructions generally. The decisions of this Court cited in Section I above, as well as decisions of other Courts of Appeals and state courts treat the different types of cases as but different applications of a single principle of law. Nor is there any hint in the language of the decision below which would show any reason to set the crime of murder apart from other crimes which, by statute or caselaw, contain necessarily included lesser offenses. State courts are thus left to speculate whether the new rule will be applied to all types of lesser included offense instructions or

whether the holding will be strictly limited in future cases to the facts in *Matthews*. Therefore, the trial courts are left by the decision below with the sort of confusion and uncertainty which breeds voluminous litigation until the matter is finally setled. Since the Court below has announced a holding which represents both a conflict with other federal courts, and portends confusion and litigation among its own lower courts, the issue can best (and most expeditiously) be settled by this Court.

The Function of the Trial Judge

At the very heart of the due process holding by the Court below are the assumptions that Pennsylvania trial courts were vested with an "unfettered discretion" to determine when to give the manslaughter charge while being furnished with no "guidelines" for the exercise of that discretion. The Commonwealth would suggest that both of these premises misconstrue Pennsylvania law. However, this argument will be more appropriately reserved to the brief on the merits of the case.

The conclusion flowing from these assumptions is, however, pertinent to the Commonwealth's request to this Court for review. Citing *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court below held that a *trial court* may not, within the confines of due process, exercise discretion on *trial rulings* unless provided with specific rules for the exercise of that discretion.

It goes without saying that this conclusion represents a considerable extension of the limited holding in *Giaccio*, which dealt with the power of a jury to assess a fine for any unspecified misconduct and the ability of an accused to defend against unnamed and entirely unspecified charges. The holding of the Court

below would destroy the function of the trial judge as it is known in Anglo-Saxon jurisprudence. Throughout a trial, particularly a jury trial, the court is called upon to make countless judgments upon issues which are vested in his "sound discretion." A minor partial list would include continuance requests,[13] severance requests,[14] voir dire,[15] limitation of cross-examination, sequestration of the jury, bail, and sentencing. In all of these situations no specific guidelines are given to the trial courts, other than perhaps some minimum standard of fairness due the accused and some scattered cases holding that a defendant was *not* entitled to some particular request which was refused him (precisely the same sort of minimum guidelines[16] the court below found inadequate).

Thus, the decision below throws into question virtually the entire judicial function. To a large extent the orderly control of a trial depends upon the exercise of discretion of the trial judge, and in particular upon his ability to act with a wide degree of latitude to fit the ruling to the particular circumstances of the case. The portent of the ruling below on the function of the trial judge boggles the imagination.

Finally, the relief fashioned by the Court below to satisfy its due process holding is nothing short of frightening. Since some trial courts *may* give the charge even though others do not when the evidence does not support it, the Court below reasons that due process requires that *all* defendants be given the charge upon request. The difficulty with such relief

[13] *Aldridge* v. *United States*, 283 U.S. 308 (1931); *United States* v. *Cockerham*, 476 F.2d 542, 544 (D.C. Cir. 1973).

[14] *United States* v. *Jenkins*, 496 F.2d 57, 67-68 (2d Cir. 1974).

[15] *United States* v. *Torbert*, 496 F.2d 154 (9th Cir. 1974).

[16] That the charge is required where any evidence would support the verdict, and that the accused is not entitled to the charge where there is no such evidence.

lies in the essential unappealability of rulings— erroneous or not—favorable to the defendant, and the practice of some trial courts of erring in close cases in the defendant's favor rather than risking reversal on appeal. Because of these realities, any situation calling for the exercise of discretion will inevitably result in some instances of defendants getting benefits to which they are not by law entitled, but which cannot be appealed by the state.

If every time such benefits are given in occasional cases, due process requires an extension of the benefit to *all* defendants, the eventual result will be to throw the scales of justice far out of balance. An "error" which unfairly benefits the state will be promptly corrected on appeal. An "error" which unfairly benefits the accused will not be corrected, and ultimately will be extended to all others. Under such a system excesses favoring the state would be disallowed, but excesses favoring a defendant would not only go uncorrected, but would become the standard.

Finally, the trial judge is put in an altogether untenable position. His rulings must be error-free, even in the most difficult and delicate situations. He must always tread a fine line between reversal and the prospect of making bad law.

For the reasons set forth above, the due process holding of the Court below threatens to wreck havoc with the traditional function of the trial judge, and throw our system of criminal justice out of balance.

CONCLUSION

It is therefore respectfully submitted that a writ of certiorari should issue to review the decision of the Third Circuit.

Respectfully submitted,

F. Emmett Fitzpatrick
District Attorney

Richard A. Sprague
First Assistant District Attorney

Abraham J. Gafni
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APPENDIX A

ORDERS ENTERED BY THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1424

UNITED STATES ex rel.
WILLIAM MATTHEWS

v.

ROBERT L. JOHNSON, Supt.
DISTRICT ATTORNEY OF PHILADELPHIA
COMMONWEALTH OF PENNSYLVANIA,
Appellant

(D. C. Civil No. 73-159)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge*, and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges*.

JUDGMENT ON REHEARING

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel and later submitted on rehearing en banc.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the

said District Court, filed April 4, 1973, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

Clerk

August 15, 1974

• • • • •

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1424

UNITED STATES OF AMERICA ex rel.
WILLIAM MATTHEWS

v.

ROBERT L. JOHNSON, Superintendent, State Correctional Institution, Graterford, Pennsylvania
COMMONWEALTH OF PENNSYLVANIA,
Appellant

At the direction of the Court,

It is ORDERED that the petition for rehearing by the Appellant be and hereby is filed out of time as of the date it was received, namely, August 30, 1974.

For the Court,

Clerk

Dated: September 18, 1974

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1424

UNITED STATES OF AMERICA ex rel.
WILLIAM MATTHEWS

v.

ROBERT L. JOHNSON, Superintendent, State Correctional Institution, Graterford, Pennsylvania
COMMONWEALTH OF PENNSYLVANIA,
Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by

Appellant

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ ALDISERT
Judge

Dated: September 19, 1974

APPENDIX B

OPINION OF THE COURT OF APPEALS

CORRECTED COPY

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1424

UNITED STATES OF AMERICA ex rel.
WILLIAM MATTHEWS

v.

ROBERT L. JOHNSON, Superintendent
DISTRICT ATTORNEY OF PHILADELPHIA,

COMMONWEALTH OF PENNSYLVANIA, *Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(District Court Civil Action No. 73-159)

Argued January 15, 1974

Before: SEITZ, *Chief Judge,* and KALODNER, and ALDISERT, *Circuit Judges.*

Submitted in banc under Third Circuit Rule 12(6)
May 15, 1974

Before: SEITZ, *Chief Judge,* and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 15, 1974)

Abraham J. Brem Levy, Esq.
Philadelphia, Pennsylvania
COUNSEL FOR APPELLEE

Judith Dean, Assistant District Attorney
Milton M. Stein, Assistant District Attorney, Chief, Appeals Division
Richard A. Sprague, First Assistant District Attorney
Philadelphia, Pennsylvania
COUNSEL FOR APPELLANT

ALDISERT, *Circuit Judge.*

This court is required to resolve a knotty Fourteenth Amendment problem in Pennsylvania murder trials which has evenly divided the justices on that state's highest court.[1] We are to decide whether, in a prosecution on a murder indictment, the Fourteenth Amendment requires the trial court, upon request, to give the jury the option of returning a verdict of voluntary manslaughter.[2] Adopting a Magistrate's Report and Recommendation, the district court reasoned that because Pennsylvania case law permits a jury verdict of voluntary manslaughter in the absence of evidence supporting the elements of that offense,[3] and also permits the trial court to exercise its discretion in deciding whether to give instructions on volun-

1. *Commonwealth v. Davis*, 449 Pa. 468, 297 A.2d 817 (1972).

2. Since May 2, 1974, Pennsylvania substantive law requires the manslaughter instruction to be given. In an equally divided court three justices (Roberts, Pomeroy and Manderino) rested the decision on constitutional grounds. Three (Nix, Eagen and O'Brien) relied on an exercise of the court's supervisory power: "We therefore, under our supervisory power, rule that henceforth a defendant under indictment of murder will be entitled, *upon request*, to have the jury advised of its power to return a verdict of voluntary manslaughter." *Commonwealth v. Jones*, — Pa. —, — A.2d — (1974) (Slip Opinion, Nix, J. at 9). Because the new Pennsylvania rule does not apply to this appellant we must still decide the constitutional issues raised in this appeal.

3. [W]here the evidence would be sufficient to support a conviction of murder, the return of a verdict of voluntary manslaughter is strictly within the jury's prerogative even in the absence of provocation and passion. *Commonwealth v. Hoffman*, 439 Pa. 348, 356-357, 266 A.2d 726, 731 (1970). *See Commonwealth v. Butcher*, 451 Pa. 359, 304 A.2d 150, 153 (1973). *See also* authorities collected in *Commonwealth v. Jones, supra*, separate opinions of Nix, J., p. 2 n.2; Roberts, J., p. 1 n.1.

tary manslaughter,[4] a failure to submit the issue to the jury violated the defendant's constitutional rights of Due Process and Equal Protection. Accordingly, it granted a writ of habeas corpus. The Commonwealth appealed. Without reaching the Equal Protection issue, we affirm.

The relevant facts were summarized briefly in *Commonwealth v. Matthews*, 446 Pa. 65, 285 A.2d 510, 511 (1971):

> From the evidence, the jury was warranted in finding that Matthews, on February 23, 1968, acting in concert with his nephew, James Williams, and a friend, James Jackson, robbed Randolph Butts in Philadelphia and during the perpetration of the robbery Butts was stabbed four times by one of the felons, causing injury which resulted in Butts' death.

I.

We begin our analysis with the Pennsylvania substantive law of voluntary manslaughter. For federal purposes we accept Justice Pomeroy's statement of the appropriate state law:

> While it is considered felonious, voluntary manslaughter is the least culpable form of homicide included within a murder indictment. Thus, when considering the degree of culpability of an individual being tried under such an indictment, a jury may return a voluntary manslaughter verdict if it finds that the killing, although intentional, was committed without malice; that is, the accused may be shown to have been acting under the influence of sudden passion which was caused by legally adequate provocation that placed him beyond the control of reason.[5] See e.g., Common-

4. *Commonwealth v. LaRue*, 381 Pa. 113, 112 A.2d 362 (1955).

5. The difference in culpability between first or second degree murder and voluntary manslaughter is reflected in the punishments which accompanied

wealth v. Walters, 431 Pa. 74, 244 A.2d 757 (1968); Commonwealth v. Paese, 220 Pa. 371, 69 A. 891 (1908). These elements need not always be present, however, to support a voluntary manslaughter verdict. Pennsylvania courts have long accepted the common law rule that the jury has the power to find a defendant guilty of voluntary manslaughter even in the absence of passion or provocation, where the evidence is sufficient to support a first or second degree murder verdict. Commonwealth v. Hoffman, 439 Pa. 348, 266 A.2d 726 (1970); Commonwealth v. Kellyon, 278 Pa. 59, 122 A. 166 (1923); Commonwealth v. Gable, 7 Serg. & R. 423 (1821). Although superficially such a rule may seem incongruous, it does have a rational basis. In essence, the rationale of the rule is founded on two considerations: (1) the legal concept that voluntary manslaughter is by definition a lesser offense than murder but one included within a murder indictment, (2) a realistic appreciation of the fact that factors such as sympathy or extenuating circumstances may lead a jury to find a defendant guilty of the lesser included offense of voluntary manslaughter even though the evidence is enough to establish guilt of murder in the second or even the first degree. Commonwealth v. Hoffman, *supra*.

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1. (Cont'd.)

conviction of these respective offenses at the time of this offense. A conviction for first degree murder carried with it death or life imprisonment. Sanctions that were imposed upon one found guilty of second degree murder included imprisonment for a term not exceeding twenty years and a fine of up to ten thousand dollars. Act of June 24, 1939, P.L. 872, § 701, 18 PA. STAT. ANNO. § 4701. Punishment for voluntary manslaughter, in contrast, could not exceed twelve years imprisonment and six thousand dollars fine. Act of June 24, 1939, *supra*, § 703, 18 PA. STAT. ANNO. § 4703. Title 18 of the Consolidated Pennsylvania Statutes was amended December 6, 1972, effective June 6, 1973. The punishment for first degree murder remains the same. Act of December 6, 1972, P.L. , No. 334, § 1, 18 PA. STAT. ANNO. § 1102 (1973). Punishment for second degree murder is imprisonment for not more than twenty years. Voluntary manslaughter is punishable by imprisonment for not more than ten years. Act of December 6, 1972, *supra*, § 1, 18 PA. STAT. ANNO. § 1103. The maximum punishment for voluntary manslaughter has been reduced by two years.

> Imposed upon this conceptual framework is a second rule. . . . That rule gives a trial judge complete discretion in deciding whether or not to submit voluntary manslaughter to the jury as a possible verdict in a case where there is no evidence of passion or provocation.[6] See, e.g., Commonwealth v. LaRue, 381 Pa. 113, 112 A.2d 362 (1955); Commonwealth v. Yeager, 329 Pa. 81, 196 A. 827 (1938). The reason for this rule is said to be that a charge on a point or issue which is unsupported by any evidence ". . . is likely to confuse the jury and obstruct Justice." Commonwealth v. Pavillard, 421 Pa. 571, 220 A.2d 807 (1966).

Commonwealth v. Matthews, supra, 285 A.2d at 517.

II.

The genesis of the federal constitutional problem is the anomaly that although the jury has unfettered power to return a voluntary manslaughter verdict as a lesser included offense of a murder indictment, it could not do so if the trial judge refused to charge on this point. Thus, whether the jury was given this opportunity was solely dependent upon the unrestricted discretion of the trial judge.[7] Justice Pomeroy, speaking for himself and Justice Roberts, concluded:

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6. At oral argument before this court, counsel for Matthews conceded that there was no evidence of provocation or passion presented at trial.

As we have noted, *supra*, n.2, Pennsylvania trial judges must now grant the request for a voluntary manslaughter charge in all murder cases being tried on or after May 2, 1974. However, the above-described practice would still obtain in all cases not within the purview of the new rule.

7. "By both tradition and constitutional mandate the jury is given the responsibility of determining guilt or innocence according to instructions of law delivered by the court." *United States v. Berrigan*, 482 F.2d 171, 175 (3d Cir. 1973). Fundamental to the judicial system is the principle that it is the court, and not the jury, which defines the legal elements of the offense and limits the alternatives open to the jury in returning a verdict. As Justice Cohen stated in his dissent in *Commonwealth v. Pavillard, supra*, 220 A.2d at 811:

> How is a jury able to exercise its power [to return a verdict of guilty of manslaughter] when it is never advised that it has such power?

> In my view, the due process and equal protection clauses of the Fourteenth Amendment require the abandonment of the procedure now again sanctioned by the court. Due process is violated where a state procedure denies to those subject to it the fundamental fairness required in a system of ordered liberty. Rochin v. California, 342 U.S. 165, 169, 72 S. Ct. 205, 96 L. Ed. 183 (1952). The procedure here, grounded as it is upon the exercise of absolute discretion by the trial judge, without the benefit of any objective standards to guide him, is patently arbitrary and unfair.

Commonwealth v. Matthews, *supra*, 285 A.2d at 518.[8]

The majority in *Matthews* did not meet the constitutional issue:

> Appellant next asserts the trial court committed error in refusing a specific request to instruct the jury on voluntary manslaughter, and also in failing to submit to the jury such a finding as a possible verdict. Since there was no evidence which pointed in the slightest degree to the offense of manslaughter, the court's action did not constitute error. Commonwealth v. LaRue, 381 Pa. 113, 112 A.2d 362 (1955); and Commonwealth v. Flax, 331 Pa. 145, 200 A. 632 (1938).

285 A.2d at 514.[9]

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8. In *Commonwealth v. Davis*, *supra*, 297 A.2d at 819, Justice Pomeroy again argued:

> [B]ecause the choice whether or not to charge is discretionary with the trial judge, and he has been furnished with no objective standards for his guidance, the challenged practice offends due process. . . .

9. The opinion in support of affirmance in *Commonwealth v. Jones*, *supra*, — A.2d at — (Slip Opinion at 10), answered the due process contention thusly:

> The opinion in support of reversal predicates its constitutional objections on the assumption that under the rule existing at the time of this trial "the choice whether or not to charge [on voluntary manslaughter] is discretionary with the trial judge, and he has been furnished with no objective standards for his guidance." We cannot accept the assumption upon which these arguments are premised. The rule in question was based upon a theory of lesser included offenses. For this purpose, manslaughter

III.

Thus, to offset Justice Pomeroy's constitutional contentions we must turn to the argument presented by the Commonwealth. It builds first on *Sparf v. United States*, 156 U.S. 51 (1895), which approved a jury charge given in a trial for murder on the high seas, which charge instructed the jury that it was not authorized to return a verdict of manslaughter because there was no evidence showing that crime. The Court stated: "A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof, and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law." *Id.* at 64. Moreover, the Commonwealth directs us to *Government of the Virgin Islands v. Carmona*, 422 F.2d 95, 101 (3d Cir. 1970), in which we held "there was no error in failing to charge

9. (Cont'd.)

was defined in the traditional sense. Thus, it was reasoned that the right to the charge existed *only* where evidence of provocation and passion could be found. Necessarily, where there was an absence of provocation and passion there was no right to such a charge. Cf., *Keeble v. United States*, 412 U.S. 205 (1973).

This statement, however, defines the defendant's *right* to a charge on voluntary manslaughter, while still leaving to the trial judge the ultimate decision on whether such a charge should be given. See *infra*, p. 13.

Likewise, in *Commonwealth v. Davis*, *supra*, 297 A.2d at 821, Justice O'Brien, speaking for himself, Chief Justice Jones and Justice Eagen, reasoned that under Pennsylvania law "a defendant is entitled to a charge on the law of manslaughter only when there is some evidence to support such a verdict." He did not meet the constitutional issues raised but concluded that the facts of that felony-murder case rendered "any evidence of passion or provocation . . . irrelevant." *Id.*, at 822.

In *Commonwealth v. Cannon*, 453 Pa. 389, 309 A.2d 384 (1973), the defendant argued that there was evidence to support a verdict of manslaughter and therefore he was entitled to an instruction thereon. A majority of the court held that there was no evidence of passion or provocation and the refusal to instruct was not error; no constitutional issues were discussed. Justices Roberts, Pomeroy and Manderino dissented for the reasons expressed by Justices Roberts and Pomeroy in *Matthews* and *Davis*.

as to voluntary manslaughter in the circumstances of the instant case. As there was no evidence of a quarrel or fit of passion, the jury could not have correctly found Carmona guilty of voluntary manslaughter," citing *Stevenson v. United States*, 162 U.S. 313, 315 (1896).

Next, the Commonwealth argues that notwithstanding these and other cases, courts have found it necessary to uphold a defendant's conviction of a lesser included offense where a trial judge erroneously submitted the offense to the jury. The underlying rationale of these latter cases is that the Constitutional prohibition against double jeopardy[10] barred correction of the trial judge's error.

But neither *Sparf* nor *Carmona* meets the Due Process argument properly presented in these federal habeas corpus proceedings. The Supreme Court in *Sparf* and this court in *Carmona* were confronted with issues of statutory construction only;[11] neither discussed the Pennsylvania practice presently under review.[12]

The Commonwealth then emphasizes that "[n]o court has held that because jury instructions not recognized by the law and overly favorable to one defendant were given at his trial, that thereafter every defendant is entitled to those same instructions."[13] Underlying this argument is the assumption that, in Pennsylvania, the jury could not properly return a verdict of voluntary manslaughter on a murder indictment absent evidence of passion or provocation. However the common law[14] and Pennsylvania substantive law recognize the jury's "power,"[15] indeed "pre-

10. One found guilty of a lesser offense is impliedly acquitted of the greater offense, thereby prohibiting retrial on the higher charge. *Green v. United States*, 355 U.S. 184 (1957).

11. Section 1035 of the Revised Statutes and its successor provision F.R. Crim. Pro. 31(C), the federal "lesser offense" statutes.

12. The Commonwealth cited various state court decisions from other jurisdictions. These cases also do not address themselves to the Pennsylvania practice.

13. Commonwealth brief at 13.

14. *Commonwealth v. Jones, supra.*

15. "[T]he jury had the *power*, even though the evidence established murder, to find a voluntary manslaughter verdict." *Commonwealth v. Kellyon, supra*, 122 A. at 167 (emphasis supplied).

rogative,"[16] to return such a verdict if the court submits the issue to them. Moreover, in upholding such verdicts, the Pennsylvania Supreme Court has not relied on double jeopardy grounds but on the twofold consideration stated recently in *Commonwealth v. Hoffman, supra*, 266 A.2d at 732: "a realistic appreciation of the humanity of those who sit on our juries and the legal concept that voluntary manslaughter is by definition a lesser included offense than murder but one included in a murder indictment."

Our research has not disclosed a Pennsylvania Supreme Court decision which unequivocally held that, on an indictment for murder, it would be error for a trial judge to charge on voluntary manslaughter where there was no evidence of passion or provocation. The court has had numerous opportunities to do so[17] but instead has framed its holding in terms of what a defendant has a right to expect or whether the trial court's refusal to instruct was in error. These cases still leave the final decision on whether to charge within the discretion of the trial judge. We now proceed to a consideration of the Due Process argument.

IV.

At a time when the contours of procedural due process were beginning to become visible, Mr. Justice Cardozo recognized the difficulty in establishing a universal definition of due process: "The line of division may seem to be

16. See footnote 3, *supra*. In *Commonwealth v. Robinson*, 305 Pa. 302, 157 A. 689, 692 (1931), the court approved the following instruction given by the trial judge in a murder case:

> While we have defined to you the crime of voluntary manslaughter, we say to you, members of the jury, as we view the case, there is no evidence in it that would warrant a verdict of voluntary manslaughter, although, in the absence of evidence, it is within your power to render such a verdict, because, in the crime of murder, the jury always has the right to fix the degree of the homicide.

17. *See* cases cited in *Commonwealth v. Jones, supra*, Slip Opinion, Nix, J. at 1 n.1. We note that the opinions in support of affirmance in neither *Commonwealth v. Jones, supra*, nor *Commonwealth v. Davis, supra*, quoted any Pennsylvania cases with language to this effect.

wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. * * * Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? " *Palko v. Connecticut*, 302 U.S. 319, 325, 328 (1937) (citations omitted).[18] Later Mr. Justice Frankfurter would emphasize that "[r]egard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" *Rochin v. California*, 342 U.S. 165, 169 (1952) (citation omitted).

In the decades which have followed, the Supreme Court has not formulated a bright line definition. But, in discussing the right to a jury trial in a criminal case, the Court expressed this country's historic desire to minimize arbitrary judicial activity: "The framers of the Constitution strove to create an independent judiciary but insisted upon further protection against *arbitrary* action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the *complaint, biased* or *eccentric judge*. * * * Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—*a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge* or to a group of judges." *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (emphasis supplied).

18. While the substantive ruling in *Palko* was overruled in *Benton v. Maryland*, 395 U.S. 784 (1969), the essence of these remarks still obtains. *Cf., Roe v. Wade*, 410 U.S. 113 (1973).

To recite these broad-base principles is to reinforce the conclusion reached by Pennsylvania Justices Roberts, Pomeroy and Manderino in *Commonwealth v. Jones, supra,* that the Pennsylvania practice did not comport with the protections extended this appellee by the Constitution. At the time he was tried, the jury was given the option of returning a verdict of murder in the first degree calling for life imprisonment or death,[19] or alternatively, a verdict of murder in the second degree, calling for a sentence of up to twenty years. Another trial judge, or the same judge on another day, could have permitted the jury to return a verdict of voluntary manslaughter, calling for a sentence of no more than twelve years. To deny appellee the possibility of a lesser verdict with a lesser restraint of liberty is permissible only if the denial comports with due process. To deny appellee the possibility of a lesser restraint of liberty because of a practice which permits arbitrary trial court activity is offensive to those settled concepts of due process.

The opinion in support of affirmance[20] in *Commonwealth v. Davis, supra,* 297 A.2d at 821, essentially acknowledged the absence of standards prior to May 2, 1974: "[T]he establishment of standards for application in all cases must await further development of our case law. . . ." A lack of any standard to guide a decision which has the capability of restricting the liberty or property of a defendant would seem to offend settled concepts of due process. Thus, in invalidating a Pennsylvania practice which failed to furnish a criminal court jury with standards to guide a decision as to whether costs should be imposed upon a defendant in whose favor a not guilty verdict was rendered, the Supreme Court found the practice "vague and standardless," and therefore offensive to due process:

19. Appellee was convicted in 1968 four years before the Supreme Court's decision in *Furman v. Georgia,* 408 U. S. 238 (1972).

20. This opinion was authored by Justice O'Brien and he was joined by Chief Justice Jones and Justice Eagen. Although Chief Justice Jones took no part in the consideration or decision of *Commonwealth v. Jones, supra,* Justices O'Brien and Eagen were among the three justices opting for a supervisory rule.

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See, *e.g., Lanzetta v. New Jersey*, 306 U.S. 451; *Baggett v. Bullitt*, 377 U.S. 360. This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of the crime charged against him. * * * Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This state Act as written does not even begin to meet this constitutional requirement.

Giaccio v. Pennsylvania, 382 U.S. 399, 402-403 (1966).

It is undisputed that there are no "legal standards that courts must enforce" in giving or not giving the manslaughter charge in a Pennsylvania murder indictment. Accordingly, we conclude that the powerful rationale of *Giaccio* commands a similar result in this case.

We believe that the safeguards of due process will be satisfied only when all defendants in Pennsylvania murder trials are given the same opportunity, upon request duly made, to have a jury return a verdict of voluntary manslaughter as well as first and second degree murder.[21] To

21. It appears that Pennsylvania law requires that a jury be told that they can return a verdict of second degree murder in all first degree murder cases. *Commonwealth v. Gibbs*, 366 Pa. 182, 76 A.2d 608 (1950); *Commonwealth v. Davis, supra*, 297 A.2d at 822 n.1 (O'Brien, J., Opinion in Support of Affirmance).

hold otherwise is to expose a defendant to the idiosyncracies of the trial judge to whom the case has been assigned, or the "whim or caprice"[22] of a given judge on a given day. Accordingly, we affirm the judgment of the district court.[22a]

V.

The Commonwealth advances the argument that "[i]f this Court should conclude that a valid constitutional issue is presented, it would be inappropriate to reverse Matthews' conviction." (Commonwealth brief at 6 n.1.) It reasons that this defendant has suffered no prejudice because the jury in fact returned a verdict of first degree and not second degree murder. Thus, the Commonwealth argues harmless error. This contention overlooks the possibility that if a jury had three options instead of two, the jury could have compromised on the middle ground of second degree. Although of course no one can say with precision that given three alternatives, the jury has a greater probability of compromise, we do recognize that with three alternatives, at least "there is a reasonable possibility" of compromise. *Schneble v. Florida*, 405 U.S. 427, 432 (1972).[23] Therefore, we cannot say that failure to give the charge "was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967). Moreover, the Pennsylvania Supreme Court has long recognized and approved the compromising propensities of juries. *Commonwealth*

22. *Commonwealth v. Matthews*, *supra*, 285 A.2d at 517 (Pomeroy, J., dissenting).

22a. Judge Kalodner in dissent argues that this is a felony/murder case and that "existence of passion and provocation . . . is of no relevance," citing *Commonwealth v. Meleskie*, 278 Pa. 387, 123 A. 310 (1924). However, we are concerned here not with the existence or relevance of such evidence but rather with the jury's ability to exercise its power to return a verdict of voluntary manslaughter, absent supportive evidence.

This power of the jury has not been denied in felony/murder cases. *See, Commonwealth v. Butcher*, *supra*. Indeed, we note that neither opinion in *Commonwealth v. Jones*, *supra*, explicitly exempts felony/murder cases from the requirement that a charge on voluntary manslaughter be given upon request.

23. See Roger Traynor's incisive discussion, "Evaluating the Effect of Error: A Sliding Scale of Probabilities," Traynor, THE RIDDLE OF HARMLESS ERROR, (1970) 33-37.

v. Kellyon, supra, 122 A. at 168; *Commonwealth v. Hoffman, supra,* 266 A.2d at 732. This recognition dilutes the potency of the harmless error argument advanced by the Commonwealth.

VI.

Cognizant of the potential pervasive ramifications of the ruling we announce today, Judges Rosenn, Weis and the writer of this opinon are willing to consider the retroactivity issue. A majority of the court have concluded that the issue should not be resolved in this case.

In *Witherspoon v. Illinois,* 391 U.S. 510 (1968), the Court squarely decided the retroactivity issue when it announced its ruling:

> We have considered the suggestion . . . that we should "give prospective application only to any new constitutional ruling in this area". . . . [We] have concluded that neither the reliance of law enforcement officials . . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today.

391 U.S. at 523 n.22. And in its most recent pronouncement in the area of prisoners' rights, *Wolff v. McDonnell,* — U.S. — (42 U.S.L.W. 5190, June 26, 1974), the Court had the opportunity to defer ruling on the retroactivity of its newly announced procedures. It did not. Instead, the Court followed its lead in *Morrissey v. Brewer,* 408 U.S. 471, 490 (1972), and decided the retroactivity issue:

> The Court of Appeals held that the due process requirements in prison disciplinary proceedings were to apply retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged. We disagree and reverse on this point.

> The question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in *Morrissey* that the due process requirements there announced were to be "applicable to *future* revocations of parole," 408 U.S., at 490 (emphasis supplied). Despite the fact that procedures are related to the integrity of the fact-finding process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures. During 1973, the Federal Government alone conducted 19,000 misconduct hearings, as compared with 1,173 parole revocation hearings, and 2,023 probation revocation hearings. If *Morrissey-Scarpelli* rules are not retroactive out of consideration for burden on federal and state officials, this case is *a fortiori*. We also note that a contrary holding would be very troublesome for the parole system since performance in prison is often a relevant criteria for parole. On the whole, we do not think that error was so pervasive in the system under the old procedures to warrant this cost or result.

42 U.S.L.W. at 5201. Thus, we find no precedential impediment to reaching the retroactivity issue in this case.

In *United States v. Zirpolo*, 450 F.2d 424, 431-433 (3d Cir. 1971), we set forth in detail the basic teachings of the Supreme Court.[24] Basically we observed:

> In passing on the question of retroactivity, the Supreme Court considers three factors:

24. This case readily lends itself to the *Linkletter* analysis and it is therefore unnecessary to use the approach taken in *Robinson v. Neil*, 409 U.S. 505 (1973). There, the Court noted that the *Linkletter* test "is simply not appropriate" in terms of nonprocedural guarantees. *Id.*, at 508. Here we are dealing with a procedural rule.

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.
>
> Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970 (1967); Desist v. United States, 394 U.S. 244, 89 S. Ct. 1030, 22 L. Ed. 2d 248 (1969); Johnson v. New Jersey, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966); Tehan v. United States ex rel. Shott, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453 (1966); Linkletter v. Walker, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965).

450 F.2d at 432.

"Foremost among . . . [the foregoing] factors is the purpose to be served by the new constitutional rule." *Desist v. United States, supra*, 394 U.S. at 249 (footnote omitted). In *United States v. Zirpolo, supra*, we noted that "[g]enerally, rulings not primarily designed to enhance the reliability of the fact-finding or truth-determining process have not been applied retroactively," 450 F.2d at 432 and cases cited therein. We are dealing here only with those cases in which there is *no* evidence of passion or provocation.[25] Therefore, our ruling does not go to the jury's ability to determine the presence *vel non* of the elements of the crime but rather to the jury's ability to exercise its "historically recognized mercy dispensing power." *Commonwealth v. Jones, supra*, — A.2d at — (Slip Opinion, Nix, J., at 8.) Nothing we decide today affects the fact-finding process. We also recognize with Mr. Justice Brennan that " 'the question whether a constitutional rule of criminal procedure does or does not enhance the fact-finding process at trial is necessarily a matter of degree.' *Johnson*

25. Where there is any evidence of passion or provocation in a murder case, a defendant is entitled to a charge on voluntary manslaughter. *Commonwealth v. Flax*, 331 Pa. 145, 200 A. 632, 636 (1938); *Commonwealth v. Dews*, 429 Pa. 555, 239 A.2d 382, 385 (1968).

v. New Jersey . . . [384 U.S. 719], at 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall v. Denno, supra,* 388 U.S. at 298.

The significant extent to which the Pennsylvania trial courts relied on the prior state of the law is obvious. *See Commonwealth v. Matthews, supra; Commonwealth v. LaRue, supra;* and *Commonwealth v. Pavillard, supra.* The decision we reach today was not foreshadowed by prior cases. *Stovall v. Denno, supra,* 388 U.S. at 299. And we recognize that the application of full retroactivity could have a profound effect on the administration of criminal justice in Pennsylvania. The Supreme Court has relied on this factor in denying full retroactivity: *United States v. Wade,* 388 U.S. 218 (1967), and *Gilbert v. California,* 388 U.S. 263 (1967) (line-up cases) held non-retroactive in *Stovall v. Denno, supra; McCarthy v. United States,* 394 U.S. 459 (1969) (on the correct procedure for acceptance of guilty plea) denied retroactive application in *Halliday v. United States,* 394 U.S. 831 (1969).

All three considerations indicate that full retroactivity should not be accorded this decision. See cases collected in *United States v. Zirpolo, supra,* 450 F.2d at 431-433. As in *Zirpolo,* we would "conclude that our decision . . . [should] apply only to those cases . . . [in which a jury instruction for voluntary manslaughter was properly and timely requested and] if trials have been completed, are on direct appeal [in the Pennsylvania courts] on this date." 450 F.2d at 433.

The judgment of the district court granting a writ of habeas corpus will be affirmed unless the Commonwealth of Pennsylvania affords Matthews a new trial within such reasonable time as the district court shall fix following return of the mandate.

ADAMS, *Circuit Judge*, concurring:

I concur with the majority's conclusion that the Pennsylvania practice challenged here operated to deprive Matthews of due process of law.

Ordinarily, I exercise great caution and considerable hesitancy before concluding that a state practice or statute is unconstitutional. However, the Supreme Court of Pennsylvania has just recently ordained that, upon request, every murder defendant in the Commonwealth is entitled to a voluntary manslaughter instruction, whether in felony murder or general murder trials.[1] Although that ruling is, by its terms, made prospective only, it indicates that Pennsylvania has abandoned whatever stake it may have had in the rule of criminal procedure that a defendant is not entitled to such an instruction absent evidence of passion or provocation. Thus, the effect worked upon Pennsylvania's criminal justice system by the Court's ruling today is not seriously at odds with Pennsylvania's own perception of its interests. In these circumstances, we generate no undue friction, or at least a minimum of exacerbation, between a state and the federal system by holding the former Pennsylvania practice unconstitutional.

I agree with the majority that the lack of any articulable criteria for the giving or withholding of a manslaughter instruction where there was no evidence of passion or provocation made for standardless, "*ad hoc* and episodic" justice,[2] and as such constituted a violation of due process.[3] It would seem unwise, however, simply to accept a statement from a dissenting opinion in Commonwealth v. Matthews[4] as a conclusive exposition of prior Pennsylvania practice. Rather, in my judgment, we are

1. Commonwealth v. Jones, — Pa. —, 319 A.2d 142 (1974).

2. Rochin v. California, 342 U.S. 165, 172 (1952).

3. It would appear that Giaccio v. Pennsylvania, 382 U.S. 399 (1966), provides an apt description of the due process guideline to be applied in this case.

4. Majority Opinion at 7.

bound to survey all the Pennsylvania Supreme Court opinions on the subject, and to determine from them what appears to have been the Pennsylvania rule or practice. Having undertaken such an examination, I am satisfied that, in the past, trial judges in Pennsylvania had discretion to give or withhold a manslaughter instruction where no evidence of passion or provocation had been adduced. In no case that has come to my attention did the giving or withholding of the instruction lead to a reversal, or even to critical comment by the reviewing tribunal.

The dissent has pointed out that Matthews was found guilty of felony murder, as distinguished from a general murder charge, and that, whatever the situation regarding general murder, a judge under Pennsylvania law is "justified in refusing to charge upon the law of manslaughter" in a felony murder prosecution.[5] This view is grounded in the recognition that it is not logical to speak of "passion or provocation" when felony murder is involved.[6] Although there are cases which hold that a defendant is not entitled to a manslaughter charge when there is no evidence of passion or provocation in the record, no case has been called to my attention that has *mandated* the withholding of a manslaughter charge in a felony murder case, and, indeed, there appears to be some indication that manslaughter charges have been given, from time to time, when there has been no evidence of passion or provocation.

5. In this connection the dissent refers to Commonwealth v. Meleski, 123 Atl. 310 (Pa. 1924), and Commonwealth v. Davis, 297 A.2d 817 (Pa. 1972), *cert. denied* 414 U.S. 836 (1973). However, in *Davis*, only a plurality of three justices stated that in a felony murder prosecution it is "perfectly proper for a trial judge to eliminate completely the jury's consideration of a voluntary manslaughter verdict." *Id.* at 821.

6. While logic perhaps supports the elimination of "passion or provocation" in the felony murder situation, this view might nonetheless reflect an overly narrow concept of the jury's role. The jury historically functioned not only as fact finder but as a tempering element in criminal prosecutions. As Mr. Justice Nix observed in his Opinion in Support of Affirmance in Commonwealth v. Jones, — Pa. —, 319 A.2d 142, 146 (1974), the capacity of the jury to find voluntary manslaughter even without evidentiary support derives particularly from its "historically recognized mercy dispensing power." *Id.* at 150. The absence of a logical basis for a voluntary manslaughter charge is thus not conclusive of the issue.

It is apparent, therefore, that state trial judges were without standards, supplied either by the legislature or by the appellant courts, to guide them in the giving or withholding of voluntary manslaughter instructions, not only in cases of general murder but in felony murder cases as well.

Moreover, there is no indication that Pennsylvania trial judges, themselves, felt constrained by any standards in the giving or withholding of such an instruction, whether in general murder or felony murder cases. A review of state decisions would appear to disclose that while some juries were given the instruction, others were not,[7] and no explanation for giving or withholding such an instruction was required. Thus, besides fostering the potential for prejudice and arbitrariness, the prior Pennsylvania practice appears actually to have resulted in unexplicated discrimination among murder defendants.[8]

Nor can this discrimination be deemed harmless beyond a reasonable doubt, since there is no way of ascertaining how the jury in this case would have responded had it been given a manslaughter instruction.[9]

KALODNER, *Circuit Judge*, dissenting:

In the instant case the relator Matthews, acting in concert with his nephew and a friend, robbed one Butts, and

7. *See, e.g.*, Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973); Commonwealth v. Butcher, *supra;* Commonwealth v. Dennis, 252 A.2d 671 (Pa. 1969).

8. Were there an indication that trial judges in Pennsylvania never gave the voluntary manslaughter charge in the absence of evidence of passion or provocation, there would be serious reservations, at least in my mind, whether the absence of a clearly articulable standard constituted a due process violation. Too, since Matthews was convicted for felony murder, there would be no due process violation in this case if there were standards governing the giving of a manslaughter instruction in felony murder cases, even if there were no standard for general murder cases. Thus, until the *Jones* case, in 1974, there were no such standards in either type of case.

9. Harrison v. United States, 392 U.S. 219 (1968); Chapman v. California, 386 U.S. 18 (1967); United States ex rel. Macon v. Yeager, 476 F.2d 613 (3d Cir. 1973).

during the perpetration of the robbery one of the felons stabbed Butts in the back four times with an eight-inch knife causing Butts' death several hours later.

Matthews was tried to a jury on an indictment charging him with first degree murder of Butts. The trial judge, in accordance with Pennsylvania law, instructed the jury that "you may find the defendant guilty of murder in the first degree, you may find the defendant guilty of murder in the second degree, *or you may find the defendant not guilty.*"[1] (emphasis supplied). The jury found him guilty of first degree murder and fixed a sentence of life imprisonment. Matthews appealed to the Pennsylvania Supreme Court contending, *inter alia*, that the trial judge erred in refusing his request for a voluntary manslaughter instruction on the ground that the evidence afforded no basis for such an instruction. The Supreme Court rejected that contention and affirmed the judgment of sentence, Justices Roberts and Pomeroy dissenting. *Commonwealth v. Matthews*, 446 Pa. 65, 285 A.2d 510 (1971).

The majority, despite its acknowledgement that counsel for Matthews conceded at oral argument of this appeal that no evidence was adduced at the murder trial bearing on voluntary manslaughter, nevertheless holds that Matthews was denied due process when the trial judge refused for that reason to grant Matthews' request for a voluntary manslaughter instruction.

The majority has presented three grounds for its holding that Matthews was denied his Fourteenth Amendment due process guarantees.

Stated in the order of their discussion in the majority opinion, they are as follows:

> (1) "[I]n a prosecution on a murder indictment, the Fourteenth Amendment *requires the trial court, upon request, to give the jury the option of returning a verdict of voluntary manslaughter.*" (emphasis supplied).

1. Commonwealth v. Gibbs, 366 Pa. 182, 76 A.2d 608 (1950).

(2) The Fourteenth Amendment is violated when a voluntary manslaughter instruction is denied for lack of evidentiary basis *because "although the jury has unfettered power to return a voluntary manslaughter verdict* as a lesser included offense of a murder indictment, *it could not do so if the trial judge refused to charge on this point."* (emphasis supplied).

(3) The Fourteenth Amendment is violated when a request for a voluntary manslaughter instruction is denied on the ground that it lacks evidentiary basis, *because* Pennsylvania judges have at times given the instruction in the absence of evidence calling for such instruction.

I disagree with the majority's holding that Matthews was denied due process and its stated grounds for that holding for these reasons:

First, as to the majority's point that "in a prosecution on a murder indictment, *the Fourteenth Amendment requires the trial court, upon request, to give the jury the option of returning a verdict of voluntary manslaughter."*

The sum of that point is that due process "requires" a voluntary manslaughter instruction in a murder trial even though there is *no* evidentiary basis for such an instruction, viz., evidence of passion and provocation—critical ingredients of the crime of voluntary manslaughter.

The majority has not cited any case, federal or state, in support of the stated point, for the very good reason that there is none.

To the contrary, it was expressly ruled in *Sparf v. United States,* 156 U.S. 51 (1895), that the murder trial judge there did *not err* when he (1) refused "upon request" to give a voluntary manslaughter instruction because of lack of evidentiary basis for such instruction; and (2) instructed the jury that it could not properly return a

voluntary manslaughter verdict in the absence of evidence establishing commission of that crime. 156 U.S. at 103.

In *Bird v. United States*, 187 U.S. 118, 132 (1902), it was explicitly held that the murder trial judge "rightly refused" a requested instruction defining principal and accessory, "because there were no facts in the case to justify it."

The vitality of the holding in *Sparf* that a trial judge is *not* required, "upon request" to grant an instruction lacking evidentiary basis is attested to by its recent citation and application in other contexts. *Keeble v. United States*, 412 U.S. 205, 208 (1973); *Sansone v. United States*, 380 U.S. 343, 350 (1965); and *Berra v. United States*, 351 U.S. 131, 134 (1956).[2]

In *Keeble*, it was said at page 208:

> "Although the lesser included offense doctrine developed at common law to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged, *it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater*" (footnote omitted) (emphasis supplied).

This court has specifically held that a trial court does not err in failing to give a voluntary manslaughter instruction where it lacks evidentiary basis. *Government of the*

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2. *Sparf* was cited and applied in United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972); United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); United States v. Simpson, 460 F.2d 515, 518-20 (9th Cir. 1972); and United States v. Comer, 421 F.2d 1149, 1153 (D.C. Cir. 1970).

The rationale of the *Sparf* doctrine that instructions should not be given when they are without evidentiary basis was epitomized in United States v. Dougherty, *supra*, as follows at page 1133:

> "The jury's role was respected as significant and wholesome, but it was not to be given instructions that articulated a right to do whatever it willed."

Virgin Islands v. Carmona, 422 F.2d 95, 191 (1970). It may be noted parenthetically that *Carmona* was cited by *Keeble* as being in accord with its holding. 412 U.S. at 208 n.7.

The Pennsylvania Supreme Court, too, has consistently held that a murder trial judge does not err when he fails, or refuses, to give a voluntary manslaughter instruction where there is no evidence to support such an instruction.[3]

The majority makes short shrift of *Sparf* and *Carmona* on the ground that "[t]he Supreme Court in *Sparf* and this court in *Carmona* were confronted with issues of statutory construction *only;* neither discussed the Pennsylvania practice presently under review." (footnotes omitted) (emphasis supplied).

The plain fact is that neither *Sparf* nor *Carmona* turned on an issue of "statutory construction"[4] and that in both the deciding courts perceived no due process issue in the trial judge's failure, or refusal, to give a voluntary

3. Commonwealth v. Cannon, 453 Pa. 389, 309 A.2d 384 (1973) (refusal to charge); Commonwealth v. Dews, 429 Pa. 555, 239 A.2d 382 (1968) (failure to charge); Commonwealth v. Pavillard, 421 Pa. 571, 220 A.2d 807 (1966) (failure to charge); Commonwealth v. LaRue, 381 Pa. 113, 112 A.2d 362 (1955) (failure to charge); Commonwealth v. Yeager, 329 Pa. 81, 196 A. 827 (1938) (refusal to charge); Commonwealth v. Spardute, 278 Pa. 37, 122 A. 161 (1923) (refusal to charge); Commonwealth v. Newson, 277 Pa. 48, 120 A. 707 (1923) (refusal to charge); Commonwealth v. Pava, 268 Pa. 520, 112 A. 103 (1920) (failure to charge); Commonwealth v. Sutton, 205 Pa. 605, 55 A. 781 (1903) (refusal to charge); Commonwealth v. Crossmire, 156 Pa. 304, 27 A. 40 (1893) (failure to charge); Brown v. Commonwealth, 76 Pa. 319 (1874) (failure to charge).

4. *Sparf* ruled with respect to the then extant Section 1035, R.S., predecessor of present Rule 31(c), Fed. R. Crim. P., that it "did not authorize a jury in a criminal case to find the defendant guilty of a less offence than the one charged, unless the evidence justified them in so doing," and that "[t]he only object of that section was to enable the jury, in case the defendant was not shown to be guilty of the particular crime charged, *and if the evidence permitted them to do so*, to find him guilty of a lesser offence of attempting to commit the one charged." 156 U.S. at 63.

Carmona similarly construed Rule 31(c) at 422 F.2d 100 in rejecting the defendant's contention with respect to the failure of the trial court to charge on voluntary manslaughter.

Rule 31(c) provides:

> "Conviction of Less Offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

manslaughter instruction in the absence of an evidentiary basis.

It may be noted parenthetically that the federal and Pennsylvania doctrine that a trial judge is not required to give a voluntary manslaughter instruction unless the evidence calls for such instruction, is in accord with the prevailing general rule. 40 Am. Jur. 2d § 485, at 737 (1968), set forth in the margin.[5]

What has been said brings us to the majority's point that the Fourteenth Amendment is violated when a voluntary manslaughter instruction is denied for lack of evidentiary basis because *"although the jury has unfettered power to return a voluntary manslaughter verdict* as a lesser included offense of a murder indictment, *it could not do so if the trial judge refused to charge on this point."* (emphasis supplied).

The majority's statement that a jury *"could not"* return a voluntary manslaughter verdict *"if the trial judge refused to charge on this point"* is difficult to understand in light of its correct statement that a jury *"has unfettered power to return a voluntary manslaughter verdict as a lesser included offense of a murder indictment."*

The majority has not cited a single Pennsylvania case in support of its statement that a jury "could not" return a voluntary manslaughter verdict "if the trial judge refused to charge on this point." The cases it discusses on the score of that statement afford it no nourishment whatsoever.

To the contrary, it was recently explicitly held in *Commonwealth v. Cannon*, 453 Pa. 389, 309 A.2d 384 (1973)

5. "It is elementary that instructions to the jury in relation to matters not put in issue by the proof adduced are unnecessary, and requests therefor are properly refused. Although instructions in a homicide case may state a correct principle of law, they ought not to be given if they are not based upon or conform with the issues raised or facts supported by the evidence. The court is not bound, and should not be bound, to instruct the jury respecting the abstract rules of the law for homicide, but only respecting the principles applicable to the evidence of killing in the case at bar, although the giving of an abstract instruction is a cause for reversal only when it is reasonably apparent that the jury has been misled." (footnotes omitted).

that a jury *"can" return a voluntary manslaughter verdict* on a murder indictment *even though the trial judge refused a request for a voluntary manslaughter instruction.*

In *Cannon* the defendant was convicted of first degree murder. He contended on his appeal that the trial judge erred in refusing his request for a voluntary manslaughter instruction for lack of evidentiary basis.

In affirming the refusal of the requested instruction the court said:

> "Where a defendant is indicted for murder, *he can of course be convicted of manslaughter.* See *Commonwealth v. Dennis*, 433 Pa. 525, 252 A.2d 671 (1969). But where there is no evidence of the elements of manslaughter, it is not error for the trial judge to refuse to submit manslaughter as a possible verdict. [citing cases]. Without evidence of a sufficient cause for provocation, a state of rage or passion and an inadequate time to cool, the trial court is justified in denying the request for a manslaughter instruction." 453 Pa. at 396-97. (footnote omitted) (emphasis supplied).

It may be noted parenthetically that Mr. Justice Roberts, in dissenting in *Cannon* on the ground that the trial judge erred in refusing the defendant's request for a voluntary manslaughter instruction, cited *"the salutary and well-settled rule"* that *"the jury may find the accused guilty of the less offense* [voluntary manslaughter] . . . *and a conviction . . . will be sustained."* 453 Pa. 399. (emphasis supplied).

The Pennsylvania Supreme Court has in recent years, time and again, affirmed a jury's absolute "prerogative" to return a voluntary manslaughter verdict where there is evidence to support a conviction for murder even though there is no proof justifying the voluntary manslaughter verdict. *Commonwealth v. Butcher*, 451 Pa. 359, 364-65,

304 A.2d 150 (1973); *Commonwealth v. Hoffman*, 439 Pa. 348, 356-57, 266 A.2d 726, 731 (1970).[6]

In *Butcher*, and *Hoffman*, the defendants were found guilty of voluntary manslaughter on indictments charging them with murder. In both cases defendants challenged their conviction on the ground that there was no evidence of passion and provocation, the critical ingredients of the crime of voluntary manslaughter.

In rejecting that contention, the court in *Butcher* said:

> "Appellant's last argument is that a verdict of voluntary manslaughter should not be permitted when the evidence does not support such a verdict. However, this Court has consistently held that *a jury may in a murder prosecution return a verdict of voluntary manslaughter even where there is no evidence of passion or provocation.* As stated in *Commonwealth v. Hoffman*, 439 Pa. 348, 356-57, 266 A.2d 726, 731 (1970): 'Few propositions are better established in the criminal law than the doctrine that where the evidence would be sufficient to support a conviction of murder, *the return of a verdict of voluntary manslaughter is strictly within the jury's prerogative* even in the absence of provocation and passion.'" 451 Pa. at 364. (emphasis supplied).

The "power" of a jury in a murder case to convict of a lesser offense or to acquit in disregard of the evidence was succinctly epitomized, almost a century ago, in *McMeen v. Commonwealth*, 114 Pa. 300, 9 A. 878 (1886), as follows:

> "It is true the jury have the *power* even in cases of murder by poison *to convict of a lesser grade of crime.* So they have the *power* in such cases *to acquit alto-*

6. See, too, Commonwealth v. Dennis, 433 Pa. 525, 252 A.2d 671 (1969); Commonwealth v. Frazier, 420 Pa. 209, 216 A.2d 337 (1966); Commonwealth v. Nelson, 396 Pa. 359, 152 A.2d 913 (1959); Commonwealth v. Steele, 362 Pa. 427, 66 A.2d 825 (1949).

gether in the face of the clearest evidence." 114 Pa. at 305-06. (emphasis supplied).

Coming now to the majority's point that the Fourteenth Amendment is violated when a request for a voluntary manslaughter instruction is denied on the ground that it lacks evidentiary basis, *because* Pennsylvania judges have at times given the instruction in the absence of evidence calling for such instruction:

The sum of the majority's position is that while a murder trial judge does not err when he denies a voluntary manslaughter instruction for lack of evidentiary basis, the circumstance that judges have at times given the instruction in the absence of evidentiary basis, demonstrates that "*there are no 'legal standards that courts must enforce' in giving or not giving the manslaughter charge in a Pennsylvania murder indictment,*" and consequently the refusal of the instruction must be held to be a violation of due process under "*the powerful rationale*" of *Giaccio v. Pennsylvania,* 382 U.S. 399 (1966) (emphasis supplied).

I disagree with the majority's stated position for these reasons:

First, we are here concerned with a felony-murder—a homicide committed in the perpetration of a robbery,[7] and the Supreme Court of Pennsylvania, a half-century ago, announced the "legal standard" that in the commission of such a homicide evidence of existence of passion and provocation—critical ingredients of voluntary manslaughter—is of no relevance. *Commonwealth v. Maleskie,* 278 Pa. 387, 123 A.2d 310 (1924).

Second, and independently so, a defendant in a murder trial, felony or otherwise, is *not* denied due process when

7. The Pennsylvania Act of June 24, 1939, P.L. 872, § 701, as amended December 1, 1959, P.L. 1621, § 1, 18 P.S. 4701, in effect at the time of Matthews' trial, provided in relevant part:

"All murder which shall be perpetrated by means of poison . . . or which shall be committed in the perpetration of, or attempting to perpetrate any arson, rape, *robbery*, burglary, or kidnapping, shall be murder in the first degree." (emphasis supplied).

he is correctly refused a voluntary manslaughter instruction for lack of evidentiary basis simply because *in some instances* judges have *incorrectly* given the instruction in the absence of evidentiary basis. Otherwise stated, a murder trial defendant is not deprived of due process when he is refused an instruction to which he is not entitled by law just because a similarly situated defendant has been *incorrectly* accorded an instruction to which he is not entitled by law.

Third, Giaccio v. Pennsylvania, supra, is inapposite on its facts and does not point to the result reached by the majority nor afford it an iota of support.

Elaboration of my foregoing views must be prefaced by these observations:

The majority's denial of due process holding, insofar as it is premised on its "no legal standards" theory, echoes and adopts the view of Mr. Justice Pomeroy in his dissent to the affirmance of Matthews' conviction by the Pennsylvania Supreme Court, and in his subsequent dissent to the affirmance of the defendant's murder conviction in *Commonwealth v. Davis,* 449 Pa. 468, 479-80 (1972).[8]

It must immediately be noted that an application for *certiorari* was denied in the *Davis* case, *sub nom. Davis v. Commonwealth,* 414 U.S. 836 (1973). The application, in its "Reasons for Granting the Writ," urged almost *verbatim* the reasoning of Justice Pomeroy's dissent in *Davis* (and *Matthews*) to which the majority here subscribes.[9] It also invoked *Rochin v. California,* 342 U.S. 165 (1952) and *Giaccio v. Pennsylvania, supra,* here relied on by the majority. Moreover, it cited the subscription of the district court in the instant case to the Pomeroy position.

It cannot be gainsaid that while the denial of certiorari in *Commonwealth v. Davis, supra,* is not here of dispositive dimension it *is* nevertheless of illuminating significance.

8. 297 A.2d 817, 819.

9. See appendix to this dissent.

What has been said brings me to a *seriatim* discussion of my earlier stated three reasons for my disagreement with the "no legal standards that courts must enforce" phase of the majority's denial of due process holding.

The first of these reasons is that we are here concerned with a felony-murder—a homicide committed in the perpetration of a robbery, and the Pennsylvania Supreme Court, a half century ago, *did* announce the *"legal standard"* that in the commission of such a homicide evidence of passion and provocation—the ingredients of voluntary manslaughter—is of no relevance. *Commonwealth v. Meleskie, supra.*

In *Meleskie,* the defendant killed a woman he was attempting to rape. He was tried and convicted of felony murder in the first degree after the trial judge instructed the jury that there was no evidence of manslaughter in the case. He contended on his appeal that the trial judge erred in his instruction in light of the testimony that after the defendant has thrown the murder victim to the floor in his rape attempt "'she hit him in the face . . . she bit his finger, and *then he got mad* and . . . shot [her] two times and shot himself once.'"

The Pennsylvania Supreme Court rejected the defendant's contention and affirmed his conviction.

In doing so it said at pages 386 and 387:

> Barbarous indeed would be a law permitting the plea of provocation and hot blood to a man who, when attempting to rape, flies into a frenzy and kills his victim because she forcibly defends herself against his criminal purposes; but no such rule exists in our criminal jurisprudence. . . . This grave offense would not be mitigated because, at the time of the killing, defendant's wrath was kindled by the forcible endeavors of his victim to protect herself, and, under the circumstances, the trial judge was justified in refusing to charge upon the law of manslaughter: Com. v. Spardute, 278 Pa. 37."

Meleskie was cited and followed in 1972 in *Commonwealth v. Davis, supra.* There the defendant was found guilty of murder in the first degree in the killing of a nine-year old girl in an attempt to commit rape or sodomy, after the trial judge had refused to give a voluntary manslaughter instruction and instead instructed the jury that it could *not* consider manslaughter.

In doing so the trial judge told the jury:

> "Normally, when the charge is murder, the jury may also consider the charge of voluntary manslaughter. *However, I instruct you as a matter of law in this case that manslaughter could not be considered. It would not be, under the facts in this case, an appropriate verdict. So, therefore, I instruct you to confine your consideration to the charge of murder in the first degree, or the charge of murder in the second degree, or not guilty. You have three possibilities.*" 449 Pa. at 473. (emphasis supplied).

The defendant in *Davis* contended on his appeal that the trial judge erred in his binding instructions to the jury that "manslaughter could not be considered."

The Supreme Court, by a four to three vote, rejected the defendant's contention and, citing *Meleskie,* affirmed on the ground that the defense of manslaughter is unavailable to a defendant in a felony-murder trial, viz., homicide in an attempt to commit the felonies of rape or sodomy.

In doing so the Court said:

> "Although the establishment of objective standards for application in all cases must await the further development of our case law, we believe that the instant case presents an excellent example of that type of case where *it is perfectly proper for a trial judge to eliminate completely the jury's consideration of the possibility of a voluntary manslaughter verdict.* This is not a case where the court may be arrogating to itself the jury's fact-finding function by telling the jury that it

believes there is no evidence of passion and provocation such as would reduce a murder to manslaughter. *Nor* is this a case where a defendant may be penalized because he completely denied an intentional killing rather than claim mitigating circumstances surrounded it. *Instead, it is a case where any evidence of passion or provocation would be irrelevant. The record clearly shows that whoever committed this murder did so pursuant to an attempt to commit rape or sodomy on the victim. Since rape is one of the enumerated felonies, a homicide committed in the perpetration of this crime is a first degree murder.* Act of June 24, 1939, P.L. 872, § 701, as amended December 1, 1959, P.L. 1621, § 1, 18 P.S. § 4701. *The malice necessary to make a homicide murder is implied from the presence of the intent to commit the felony. The presence of passion or provocation cannot negate this malice. The fact that, at the time the killing was committed, the rapist may have been in a state of passion, perhaps out of rage at his victim's resistance or fear that his felony would be discovered, would make no difference.* If he had the culpability to commit the rape, then, when he killed in the furtherance of that felony, he is deemed to have killed with malice. See *Commonwealth v. Meleskie*, 278 Pa. 383, 123 A. 310 (1924)." 449 Pa. at 475. (emphasis supplied).

The majority has failed to take into account that we are here concerned with a felony-murder and sequentially overlooked the existence of the settled Pennsylvania "legal standard" pertaining to the non-availability of a voluntary manslaughter defense in a felony-murder trial.

Standing alone, and independently so, a defendant in a murder trial, felony or otherwise, is not denied due process when he is refused a voluntary manslaughter instruction to which he is not entitled under the evidence simply because defendants in other murder trials have been

accorded a voluntary manslaughter instruction in the absence of any evidentiary basis for such an instruction.

The Pennsylvania courts, in murder cases aside from those within the felony-murder category, have consistently held that *both* " 'sufficient cause of provocation and a state of rage or passion, without time to cool' " must be established by the evidence in order to sustain a voluntary manslaughter charge.[10]

As earlier stated, the Supreme Court of Pennsylvania has repeatedly specifically held that the failure or refusal to charge on voluntary manslaughter in non-felony murder cases is not error where there is no evidence to support a voluntary manslaughter verdict.[11]

The majority holds that albeit the Pennsylvania Supreme Court has consistently ruled that failure or refusal to charge on voluntary manslaughter in the absence of evidentiary basis, it has *not* "unequivocally held that . . . it would be error for a trial judge to charge on voluntary manslaughter where there was no evidence of passion or provocation," and it therefore follows that "the final decision on whether to charge [is] within the discretion of the trial judge."

The ready answer to the majority's reasoning is that errors favorable to a defendant are considered harmless and are therefore disregarded on appeal. *Grunewald v. United States*, 353 U.S. 391, 396-97 n.9 (1957).[12]

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10. Commonwealth v. Walters, 431 Pa. 74, 82, 244 A.2d 757, 762 (1968), quoting from Commonwealth v. Paese, 200 Pa. 371, 373, 69 A. 891, 892 (1908).

11. See note 3.

12. In United States v. Stromberg, 268 F.2d 256 (2d Cir.) *cert. denied*, 361 U.S. 863 (1959), the Court said with reference to a charge in a criminal case "overly favorable to the defendants":

"The error, since in favor of the defendants, is of course not ground for reversal." 268 F.2d at 266.

In Ebeling v. United States, 248 F.2d 429 (8th Cir.), *cert. denied sub nom.* United States v. Emerling, 355 U.S. 907 (1957), the court said with reference to a favorable instruction improperly accorded to the appellants:

"Error favorable to an appellant does not constitute a basis for reversal in a criminal case." 248 F.2d at 438.

The majority has not cited *any* case in any jurisdiction in which an appellate court has reversed a conviction because the defendant was given a favorable instruction not justified by the evidence. Nor has the majority cited *any* holding by an appellate court that due process is violated where defendant is properly denied an instruction for lack of evidentiary basis just because another defendant has been accorded a favorable instruction to which he was not entitled under the evidence. The district court's holding in the instant case is without precedent at either the trial or appellate level.

Coming now to my view that *Giaccio v. Pennsylvania, supra,* is inapposite on its facts and does not point to the result reached by the majority nor afford it any support:

In *Giaccio,* a jury acquitted the appellant on a misdemeanor indictment but assessed "costs" against him under a Pennsylvania statute permitting jurors to "determine by their verdict, whether the [acquitted] defendant shall pay the costs," and providing for his commitment to jail in default of payment or security. The jury had been instructed that it could impose the costs on appellant even though it acquitted him if it found him guilty of "some misconduct."

The Court held that the statute was unconstitutional under the due process clause "*because of vagueness and the absence of any standards* sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs." In so holding the Court said:

> "This 1860 Pennsylvania Act *contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant* who has been found by the jury to be not guilty of a crime charged against him." 382 U.S. at 402-03. (emphasis supplied).

Of imperative significance here is the fact that in holding the Pennsylvania Act violative of due process the Court said in a footnote:

"In so holding we intend to cast no doubt whatsoever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." 382 U.S. at 405 n.8.

The foregoing note was cited and quoted in *McGautha v. California*, 402 U.S. 183, 207 n.18 (1971), where the court cautioned against *federal ex cathedra* imposition of standards in the conduct of state murder trials.

In so doing it said:

"Our function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases." 402 U.S. at 195-96.

. . . .

"[T]he Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or *even those that measure up to the individual predilections of members of this Court.*" 402 U.S. at 221. (emphasis supplied).

The late Mr. Justice Black, in his concurring "Separate Opinion," pinpointed the *ex cathedra* caution of the majority in this graphic statement:

"*The Constitution grants this Court no power to reverse convictions because of our personal beliefs that state criminal procedures are 'unfair,' 'arbitrary,' 'capricious,' 'unreasonable,' or 'shocking to our conscience.'* [citing cases]. *Our responsibility is rather to determine whether petitioners have been denied rights expressly or impliedly guaranteed by the Fed-*

eral Constitution as written." 402 U.S. at 225-26. (emphasis supplied).

In *Spencer v. Texas*, 385 U.S. 554 (1967), the Court held that neither the specific provisions of the Constitution nor cases decided under the due process clause established the Supreme Court as the rule-making organ for the promulgation of state rules of criminal procedure.

In conclusion, for each of the reasons stated in this dissent, I would reverse the Order of the District Court which granted Matthews' petition for the habeas writ, and remand with directions to deny the petition.

APPENDIX

The "Reasons for Granting the Writ," set forth in the petition for a writ of *certiorari* in *Commonwealth v. Davis*,[1] denied *sub nom. Davis v. Commonwealth*, 414 U.S. 836 (1973), parallels the reasoning of the majority and Judge Adams in his concurring opinion, as evidenced by the following statements in the *Davis* "Reasons":

> "Highlighting the arbitrary and unequal application of the law to defendants charged with the crime of murder is the fact that some trial courts in Pennsylvania *always* give a charge on voluntary manslaughter, whether requested or not, and regardless of whether a factual basis for such a finding exists while other trial courts *never* give a charge on voluntary manslaughter, even when so requested, unless a factual basis for such a charge exists. See dissenting opinion in *Commonwealth v. Kenney*, 449 Pa. 562 (1972).
>
> "Because the choice whether or not to charge is discretionary with the trial judge, and he has been fur-

1. Commonwealth v. Davis, 449 Pa. 468, 297 A.2d 817 (1972).

nished with no objective standards for his guidance, the existing state of Pennsylvania law offends due process; and because the practice denies the same treatment to similarly situated defendants who happen to stand before differently disposed judges, it violates the equal protection of the laws. In allowing the trial judge complete discretion in deciding whether or not to submit voluntary manslaughter to the jury as a possible verdict in a case where there is no evidence of passion or provocation with absolutely no standards to guide him and no safeguards to militate against the exercise of whim or caprice, there is sanctioned by the court a procedure which violates due process in denying to those subject to it the fundamental fairness required in a system of ordered liberty. *Rochin v. California, supra.*" . . .

As earlier stated in my dissent, the "Reasons" also cited *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

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APPENDIX C

ORDER OF THE DISTRICT COURT, INCORPORATING THE REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE

ORDER

DAVIS, J.

Now, this 3rd day of April, 1973, after careful and independent consideration of relator's petition for a writ of habeas corpus and after review of the Report and Recommendation of the United States Magistrate, IT IS ORDERED that:

1. The Report and Recommendation is approved and adopted.

2. The petition for a writ of habeas corpus is GRANTED under the following conditions:

A. The execution of the writ will be STAYED for a period of sixty (60) days from the date of this Order to allow the Commonwealth of Pennsylvania to appeal as provided by law, or to relist the Bill of Indictment for a speedy trial.

B. Upon the expiration of the sixty (60) day time period, if the Commonwealth has not appealed or relisted the bill, the relator may petition this Court for his release and the execution of the writ.

/s/ JOHN MORGAN DAVIS, J.

REPORT

EDWIN E. NAYTHONS
U. S. MAGISTRATE

March 5, 1973

Relator, William Matthews, convicted[1] after a jury trial of murder in the first degree, with the penalty

[1] *Commonwealth* v. *William Matthews*, Court of Common Pleas, Trial Division, Criminal Section, County of Philadelphia, April Sessions 1968, No. 888, Murder.

fixed at life imprisonment, has filed a petition for a writ of habeas corpus. The conviction and sentence were affirmed[2] by the Supreme Court of Pennsylvania on December 29, 1971. *Commonwealth* v. *Matthews*, 446 Pa. 65 (1971).

In his present federal petition, relator raises the following grounds for habeas relief:

(a) that illegally seized evidence was admitted into evidence;

(b) that an involuntary confession made by relator was allowed into evidence at the trial;

(c) that although relator was sentenced to life imprisonment he was denied his right to an impartial jury when prospective jurors were challenged for cause by reason of their conscientious scruples against capital punishment;

(d) that the trial court favored the Commonwealth in its rulings on defense objections and requests;

(e) and, that the trial judge violated relator's constitutional right to due process and equal protection under the Fourteenth Amendment in refusing a specific request to instruct the jury on voluntary manslaughter, and, in refusing to charge the jury that voluntary manslaughter was one possible verdict that could be rendered.

Relator through direct appeal has sufficiently exhausted State procedures on the issues raised herein so as to merit our consideration of his petition. After a thorough consideration of the entire State record as it relates to the issues here raised, we find such to be factually complete and sufficient so that no further evidentiary hearing in this Court is necessary or warranted. *Townsend* v. *Sain*, 372 U.S. 293 (1963).

[2] Two separate dissenting opinions were filed. They will be discussed in detail at a later portion of this Report and Recommendation.

The charge brought against the relator resulted from the stabbing death of one Randolph Butts, who died on February 23, 1968, as the result of the knife wounds sustained when he was assaulted and robbed after leaving an apartment located at 3856 Haverford Avenue, Philadelphia.

In the course of their investigation, the detectives apprehended one, James Williams, relator's nephew, in connection with the robbery murder. Williams admitted having participated in the commission of the robbery, and accused relator and one, James Jackson of also having participated, and informed the police that relator had hidden the knife used in the stabbing at the apartment. Based on this information, an investigating officer caused a search warrant to issue for the apartment (where the relator was visiting his sister at the time). The search revealed a silver, eight inch knife. After taking the relator into custody and questioning him, relator made an inculpatory statement which was used against him at his trial. The warrant[3] described the property sought as "one pocketknife" and bloody clothing worn by relator on Friday, February 23, 1968.

I. Probable cause for issuance of search warrant.

Before commencing an inquiry into the sufficiency of the affidavit, it is important to note the presumptions with which reviewing courts are directed to approach such an examination:

[3] The following affidavit appeared on the face of the warrant in question: "On Fri. 2-23-68 at about 11:00 P.M., Randolph Butts, 40-N., 4938 Green St. was taken from the highway 3856 Haverford Ave. to the Presbyterian Hosp. and pronounced dead from stab wounds of the back. Investigation disclosed that James Williams 18-N., res. 3856 Haverford Avenue took part in the robbery of Randolph Butts. James Williams stated that William Matthews 18-N. 3856 Haverford and James Jackson 19-N., 4422 Brown St. had stabbed Randolph Butts and hid the knife in the 3rd floor apartment (rear) of 3856 Haverford Avenue."

". . . that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck* v. *Ohio,* 379 U.S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray* v. *Illinois,* 386 U.S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States* v. *Ventresca,* 380 U.S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones* v. *United States,* 362 U.S. 257, 270-271 (1960).[4] [Emphasis added.]

In *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and *Spinelli* v. *United States,* supra, the Supreme Court developed the following two-pronged tests for ascertaining the validity of a warrant:

"First, the application failed to set forth any of the 'underlying circumstances' necessary to enable the magistrate independently to judge the validity of the informant's conclusions . . . Second, the affiant-officers did not attempt to support their claim that their informant was 'credible' or his information reliable'." 393 U.S. 413.

Relator contends, as he did on his appeal to the Supreme Court of Pennsylvania, that the second facet of the aforementioned tests was not met in that the requesting officer did not attempt to support his claim that the informant was credible or his information reliable. In rejecting this argument, Justice Eagen said at 70-72:

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[4] *Spinelli* v. *United States,* 393 U.S. 410, 419 (1969).

"The case law is clear that when a person is an admitted participant in a crime, and the police attempt to secure a warrant upon the information received from him, the second aspect of the Supreme Court's test is met, since the fact that the individual admits participation in the crime insures his reliability. See generally, *United States* v. *Viggiano*, 433 F.2d 716 (2d Cir. 1970); *Louie* v. *United States*, 426 F.2d 1398 (9th Cir. 1970); *Gilbert v. United States*, 366 F.2d 923 (9th Cir. 1966); *Owens* v. *Scafati* [sic] F. Supp. 428 (D. Mass. 1967); *Commonwealth* v. *Stewart*, — Mass. —, 267 N.E. 2d 213 (1971); *Commonwealth* v. *Rose*, 211 Pa. Superior Ct. 205, 235 A.2d 462 (1967).

. . . the United States Supreme Court in *United States* v. *Ventresca*, supra, at 108-09, 85 S. Ct. at 746, stated that the affidavit 'must be tested and interpreted by . . . [this Court] in a common-sense and realistic fashion', and that we 'should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense manner', and that 'the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants'. Based on this guideline, it is our view that a common-sense reading of the affidavit involved is sufficient to establish Williams is reliable since he was a 'known' participant in the crime, and the magistrate could properly presume Williams knew anything he said would or could be used to implicate him in the crime, and he would not be inclined to give false information about himself, or his uncle, the appellant." [Emphasis added.]

In addition, Williams' recitation of the manner in which the crime was committed was corroborated by

the police investigation, since it was clear that a murder had been committed and it occurred as a result of stab wounds, as the informer stated, leading to the conclusion he had first-hand information. As stated in *Costello* v. *United States*, 324 F.2d 260, 262 (9th Cir. 1963), there exists at least "two means by which the credibility of an informant may be established. One is by *corroborating external circumstances occurring in the course of the very case that is at issue* . . . The other is the fact that on prior occasions in other cases the informant has given information which turned out to be reliable." [Emphasis added.]

Relator's contention that the weapons should have been suppressed because the Detective described the knife as a "penknife"; whereas he actually confiscated a "silver kitchen knife" is likewise without merit. This is because the search in this case was not "exploratory", but rather one directed in good faith towards the object specified in the warrant. As the Supreme Court said on this point at 73:

> "To rule otherwise, merely because the warrant specified a 'pocket knife' whereas a 'kitchen knife' was seized would be hypertechnical and contrary to the common-sense approach mandated in *United States* v. *Ventresca*, supra . . . Moreover, in this connection, we note that several courts have ruled that where the items to be seized are as precisely identified as the nature of the activity permits and an exact description is virtually impossible, the searching officer is only required to describe the general class of the item he is seeking . . ." (Citations omitted.) [Emphasis added.]

II. The evidentiary use of relator's confession.

Prior to the trial, the presiding judge held an evidentiary hearing on relator's petition to suppress

his confession, and after a full hearing concluding, in the first instance, that the confession was a voluntary one. While the relator testified that the confession was coerced through threats of physical violence and that his request for counsel was ignored, this testimony was specifically contradicted by the police officer to whom the confession was given. The officer stated that no questioning occurred until after the relator had been fully informed of his rights as mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and indicated he understood his rights and was willing to make a statement without the assistance of legal counsel. We note additionally that the trial court charged the jury that a confession is not admissible unless it is voluntary, and, after further defining what constituted a voluntary confession, left to the jury the final and ultimate determination of whether this confession was, in fact, a voluntary one. That relator was only eighteen years of age at the time of the interrogation does not render the confession *per se* invalid.

In determing whether any individual, be he juvenile, or adult, has intelligently waived his constitutional rights, it is necessary to examine the totality of the circumstances. Each case is to be separately considered from the subjective viewpoint of the individual who is being questioned. *United States of America ex rel. Brown* v. *Rundle*, 450 F.2d 517, 519-520 (3rd Cir. 1971); *United States of America ex rel. Walker* v. *Maroney*, 313 F.Supp 237, 239 (E.D. Pa. 1970), aff'd 444 F.2d 47 (3rd Cir. 1971).

While we are mindful, and indeed would emphasize, that the Commonwealth bears a heavy burden establishing that an accused has intelligently waived his constitutional rights, it is our conclusion that this burden has been met in the present case and that the statements were properly admitted. Prior to his giving the statement, relator was twice given the requisite

Miranda warnings and on each occasion indicated his willingness to give a statement without the presence of counsel. The statement was taken and the seven type written pages were then read back to him and signed. At the time he gave his statement, relator was eighteen years of age and had been employed for two years. There is nothing to indicate that relator did not understand his rights and the record supports the observation and conclusion of the trial judge and the court en banc. We therefore conclude in the circumstances of this case that the waiver was voluntary.

III. The challenging of jurors by the commonwealth.

Relator again contends, as he did before the State Courts, that the selection of jurors in this case constituted a deprivation of his due process rights. In this connection he argues that a jury should be composed of a cross-section of the community and, therefore, should consist not only of those prospective jurors who have no conscientious scruples against the imposition of the death penalty, but those who have such moral or conscientious scruples. In *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), a companion case to [sic] *Witcherspoon* v. *Illinois*, 391 U.S. 510 (1968), the United States Supreme Court held that where a defendant was sentenced to life imprisonment, as here, he was not denied his constitutional right to an impartial jury merely because the prosecution was permitted to challenge prosepective jurors who stated they were opposed to capital punishment or had conscientious scruples against imposing the death penalty. This same contention was also considered and rejected in *Commonwealth* v. *Speller*, 445 Pa. 32, 282 A.2d 26 (1971). See also *Commonwealth* v. *Roach*, 444 Pa. 368, 282 A.2d 382 (1971). Therefore, there is no merit to this contention and it must be rejected.

IV. The trial court's impartiality.

Relator alleges that the trial judge demonstrated bias against the defendant because it assisted the Assistant District Attorney in the presentation of his case at the suppression hearing by directing the prosecutor to recall certain witnesses. The Court noted that a witness was to be recalled because relator was then contesting the validity of the arrest though the issue had not been raised in the relator's suppression petition. (N.T. 148-149). It was therefore, necessary to obtain testimony on this point, which had not been the subject of the witnesses' previous testimony. In any event, "errors committed during the trial of a criminal case in a state court are not subject to review in a habeas corpus proceeding in a federal court *unless it is shown that the errors were so conspicuously prejudicial as to deprive defendant of a fair trial.*" *United States ex rel. Brown* v. *Russell*, 455 F.2d 464, 465 (3rd Cir. 1972); *United States of America ex rel. Cannon* v. *Maroney*, 373 F.2d 908, 910 (3rd Cir. 1967). Such a showing has not been made on the basis of this record as to this allegation. [Emphasis added.]

V. Refusal of the trial court to submit the crime of voluntary manslaughter to the jury for its consideration.

In dealing with this issue the Supreme Court of Pennsylvania stated at 74:

> "Appellant next asserts the trial court committed error in refusing a specific request to instruct the jury on voluntary manslaughter, and also in failing to submit to the jury such a finding as a possible verdict. Since there was no evidence which pointed in the slightest degree to the offense of manslaughter, the court's action did

not constitute error. *Commonwealth* v. *LaRue*, 381 Pa. 113, 112 A.2d 362 (1955); and *Commonwealth* v. *Flax*, 331 Pa. 145, 200 A. 632 (1938)."

It is on this particular point that the two dissenting opinions mentioned previously were filed. Because of the constitutional issues raised herein these dissenting opinions cannot go unmentioned. Mr. Justice Roberts in discussing this aspect said at 78 of 446 Pa.:

> " . . . it is of course unarguable that voluntary manslaughter is a lesser included offense in an indictment for murder. The jury should be so instructed. Furthermore, the jury should be advised that a verdict of voluntary manslaughter is one of the verdicts returnable under a murder indictment. The failure to do so obviously creates many potentials for incomplete, unfair, and unequal considerations in the deliberations of the jury and the verdict and treatment accorded the accused."

And Mr. Justice Pomeroy in a more searching analysis likewise wrote at 80-81:

> "Imposed upon this conceptual framework is a second rule which the majority here reaffirms. That rule gives a trial judge complete discretion in deciding whether or not to submit voluntary manslaughter to the jury as a possible verdict in a case where there is no evidence of passion or provocation. See e.g., *Commonwealth* v. *LaRue*, 381 Pa. 113, 112 A.2d 362 (1955); *Commonwealth* v. *Yeager*, 329 Pa. 81, 196 Atl. 827 (1938). The reason for this rule is said to be that a charge on a point or issue which is unsupported by any evidence '. . . is likely to confuse the jury and obstruct justice'. *Commonwealth* v. *Pavillard*, 421 Pa. 571, 220 A.2d 807 (1966).

Thus, while a jury has the power to return a verdict of guilty of the lesser included offense of voluntary manslaughter in every case tried pursuant to a murder indictment, this power may be effectively negated by the decision of a trial judge to refuse to charge the jury on this point. *In making this decision, the judge has no standards to guide him and there are no safeguards which would militate against the exercise of whim or caprice.*

In my view, the due process and equal protection clauses of the Fourteenth Amendment require the abandonment of the procedure now again sanctioned by the court. Due process is violated where a state procedure denies to those subject to it the fundamental fairness required in a system of ordered liberty. *Rochin* v. *California*, 342 U.S. 165, 169, 96 L.Ed. 183 (1952). The procedure here, grounded as it is upon the exercise of absolute discretion by the trial judge, without the benefit of any objective standards to guide him, is patently arbitrary and unfair.

Likewise, the equal protection clause is offended where a state cannot show a rational basis for discrimination between persons or groups of persons. Cf. *Reed* v. *Reed*, 404 U.S. 71, 30 L.Ed. 225 (1971); *Dandridge* v. *Williams*, 397 U.S. 471, 25 L.Ed. 2d 491 (1970); *Shapiro* v. *Thompson*, 394 U.S. 618, 22 L.Ed. 2d 600 (1969)." [Emphasis added.]

As revealed in *Commonwealth* v. *Davis*, 449 Pa. 468 (1972), this perplexing problem has still not been laid to rest by the Pennsylvania Supreme Court. In *Davis*, the court was evenly divided on the identical issue thereby affirming the judgment of sentence. In his dissent, Mr. Justice Pomeroy (joined by Justice

Roberts and Justice Manderino) once again pointed up the dilemma of the Pennsylvania Trial Courts by saying at page 480:

> "The opinion in support of affirmance stands for the proposition that in a felony-murder case, 'it is perfectly proper for a trial judge to eliminate completely the jury's consideration of the possibility of a voluntary manslaughter verdict', and that, accordingly, the judge in this case did not err in charging the jury that 'as a matter of law . . . manslaughter could not be considered.' The opinion does not state that juries must be so instructed in all felony-murder cases, nor that it would be error for the charge to be silent on the question of manslaughter, nor that it would be error for a judge to charge that the jury could, although under the evidence it should not, return a verdict of voluntary manslaughter. *Thus the trial courts are still left with uninstructed discretion as to when they will or will not advert in their charges to the manslaughter possibility, and in what terms.*" [Emphasis added.]

To gain further insight into the cause of this unique problem a review of the Pennsylvania law may prove helpful. The law in Pennsylvania has uniformly held that where there is absolutely no evidence of the elements of manslaughter it is not error for the trial judge to refuse to charge on this point or submit manslaughter as a possible verdict. *Commonwealth* v. *Flax*, 331 Pa. 145 (1938); *Commonwealth* v. *LaRue*, 381 Pa. 113 (1955); *Commonwealth* v. *Dews*, 429 Pa. 555, 558. However, the law is equally clear that in any murder prosecution the jury may always return, and the court must accept a verdict of voluntary manslaughter. *Commonwealth* v. *Hill*, 444 Pa. 323 (1971); *Commonwealth* v. *Hoffman*, 439 Pa. 348 (1970); *Com-*

monwealth v. *Harry*, 437 Pa. 532 (1970); *Commonwealth* v. *Dennis*, 433 Pa. 525 (1969); *Commonwealth* v. *Cooney*, 431 Pa. 153 (1968); *Commonwealth* v. *Pavillard*, 421 Pa. 571 (1966); *Commonwealth* v. *Frazier*, 420 Pa. 209 (1966); *Commonwealth* v. *Arcurso*, 283 Pa. 84 (1925); *Commonwealth* v. *Galle*, 7 Serg. R. 423 (1821).

Yet the Supreme Court of Pennsylvania has pronounced the view that when there is no factual basis to support a finding of voluntary manslaughter, the trial court may in its discretion refuse to charge on voluntary manslaughter, even when so requested, thus effectively keeping the jury unaware of its power. In so holding, the Court completely ignores the uniformly applied legal principle that a jury may always, in any murder prosecution return a verdict of voluntary manslaughter. Instead the Court has permitted the trial court's decision on whether to charge on voluntary manslaughter to nothing more than *ad hoc* notion. In *Rochin v. California*, 342 U.S. 165, 172 (1950), Mr. Justice Frankfurter said:

> "In each case 'due process of law' requires an evaluation based on a disinterested inquiry pursued in the spirit of science and a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims . . . *on a judgment not ad hoc and episodic* but duly mindful of reconciling the needs both of continuity and of change in a progressive society." [Emphasis added.]

Is it not reasonable to ask: how is a jury able to exercise its power when it is never advised that it has such power? The rule being followed in Pennsylvania has undoubtedly led to an arbitrary justice where there is a murder indictment without facts showing manslaughter, since trial judges have capri-

ciously chosen to charge the doctrine or not. Compare *Commonwealth* v. *Yeager*, 329 Pa. 81, 196 A. 827 (1938) with *Commonwealth* v. *Robinson*, 305 Pa. 302, 157 A. 689 (1931). In the latter case the Pennsylvania Supreme Court found no error in a charge which told the jury (1) the elements of manslaughter, (2) that there was no evidence of the crime, (3) that they still had it in their power to find manslaughter.

If, in fact, the purport of the decision by the Supreme Court of Pennsylvania majority is to bar the trial judge in all felony-murder cases from charging on voluntary manslaughter, the due process objection would be obviated with respect to this category (i.e. felony-murder) of murder cases by supplying a clear-cut mandate; the decision would not, however, eliminate the unconstitutional discrimination between different defendants charged with murder of the felony-murder type on the one hand and common law murder on the other.

Particularly relevant to the present case is the decision in *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966). That case involved a statute whereby Pennsylvania attempted to mitigate the harshness of its common law rule requiring criminal defendants to pay the costs of prosecution in all cases by committing the matter to the discretion of the jury in cases where the defendant was found not guilty Mr. Justice Black speaking for the majority aptly stated at 402-404:

> "We agree with the trial court . . . that the 1860 Act is invalid under the Due Process Clause because of vagueness and the *absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs.*
>
> . . . It is established that a law fails to meet the requirements of the Due Process Clause if

it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or *leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.* This 1860 Pennsylvania Act contains no standards at all . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that *the law must be one that carries an understandable meaning with legal standards that courts must enforce . . .*

. . . The State contends that . . . state court interpretations have provided standards and guides that cure the . . . constitutional deficiencies. We do not agree . . . In this case the trial judge instructed the jury that it might place the costs of prosecution on the appellant, though found not guilty of the crime charged, if the jury found that 'he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction [and] . . . his misconduct has given rise to the prosecution.'

It may be possibly be that the trial court's charge comes nearer to giving a guide to the jury than those that preceded it, but it still falls short of the kind of legal standard due process requires . . . 382 U.S., at 402-404 (emphasis added) (citations omitted)."

And, in *Griffin* v. *Illinois,* 351 U.S. 12, 17 (1956), the Court said:

". . . our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system-all people charged with crime must, so far as the law is concerned, stand on an equity before the bar of justice in every American court. *Chambers* v. *Florida*, 309 U.S. 227, 241. See also *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369." [Emphasis added.]

The present chilling effect of Pennsylvania law on this matter is to leave the trial courts with absolutely no standards[5] or guidance on the criminal question of whether to charge the jury on voluntary manslaughter when there is no evidence to support such a finding. Applying the above established principles to the instant case, because the choice whether or not to charge is discretionary with the trial judge, and he has been furnished with no objective standards for his guidance, the challenged practice offends due process. Because the practice denies the same treatment to similarly situated defendants who happen to stand before differently disposed judges it violates equal protection of the law. *Baxstrom* v. *Herold*, 383 U.S. 107 (1966); *United States ex rel. Schuster* v. *Herold*, 410 F.2d 1071 (2nd Cir. 1969) *cert denied*, 396 U.S. 847 (1969).

The court is not unmindful that under our system, the administration of criminal justice is generally committed to the several states; that due process of

[5] In Commonwealth v. Davis, supra, the Pennsylvania Supreme Court in affirming the judgment of conviction acknowledged that "the establishment of objective standards for application in all cases must await further development of our case law . . ." Id. at 475.

law "is not to be turned into a destructive dogma against the States in the administration of the systems of criminal justice." *Rochin* v. *People of California,* supra; that in the enforcement of their criminal laws, states have comprehensive rights in fashioning their own rules. *Knapp* v. *Schweitzer,* 357 U.S. 371, *rehearing denied* 358 U.S. 860 (1958). However, this Court in reviewing application for habeas corpus relief too has its responsibility. Regard for requirements of the Due Process Clause "inescapably imposes on this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend the cannons of decency and fairness . . . even towards those charged with the most henious offenses." *Malinski* v. *New York,* 324 U.S. 401 at 416-417.

For the foregoing reasons, relator's conviction of first degree murder was not attended by the fundamental fairness required by the Fourteenth Amendment of the Constitution. It cannot stand and the writ must issue.

Accordingly, we make the following:

RECOMMENDATION

Now, this 8th day of March, 1973, IT IS RESPECTFULLY RECOMMENDED that relator's petition for a writ of habeas corpus be GRANTED, and that the execution of the writ be stayed for a period of sixty (60) days from the date of the order of the Court to give the Commonwealth an opportunity to appeal as provided by law, or to relist the Bill of Indictment for a speedy trial.

/s/ EDWIN E. NAYTHONS
UNITED STATES MAGISTRATE

APPENDIX D

Opinion of the Pennsylvania Supreme Court

Commonwealth *v.* Matthews, Appellant.

Criminal Law—Search and seizure—Sufficiency of affidavit—Probable cause—Credibility of informant—Statement that a particular person had taken part in the felony—Statement that such person had averred that defendant had stabbed victim—Reference to knife in affidavit and to pocket knife in warrant—Common sense interpretation of affidavit—Items to be seized as precisely identified as nature of activity permits.

1. Where it appeared that a search warrant, signed by a police detective, stated that the victim of the homicide in question was taken from a highway to a hospital and pronounced dead from stab wounds of the back; that investigation disclosed that one W took part in the robbery of the deceased; and that W said that defendant had stabbed the victim; it was *Held* that the warrant satisfied the second aspect of the test set forth in *Spinelli v. United States*, 393 U.S. 410.

2. An affidavit for a search warrant must be tested and interpreted by the court in a common sense and realistic fashion; the resolution of doubtful or marginal cases should be largely determined by the preference to be accorded to warrants. [71]

3. Where it appeared that the affidavit stated that the item to be seized was merely a knife but the warrant limited the description to "one pocket knife"; it was *Held* that a kitchen knife seized was properly put in evidence.

4. Where the items to be seized are as precisely identified as the nature of the activity permits and an exact description is virtually impossible, the searching officer is only required to describe the general class of the item he is seeking. [73]

Criminal Law—Evidence—Confession—Voluntariness.

5. Where a defendant alleges that his confession was coerced by threats of physical violence and that his request for a lawyer during the period of police questioning was ignored, the credibility of his testimony is for the fact-finders below. [74]

Criminal Law—Murder—Voluntary manslaughter—Charge to jury—No evidence pointing to offense of manslaughter.

6. In a prosecution for murder, it is not error for the trial court to refuse a specific request to instruct the jury on voluntary manslaughter or to submit to the jury such a finding as a possible verdict, where there is no evidence which points in any degree to the offense of manslaughter. [74]

Criminal Law—Practice—Jury—Selection—Excusing jurors for cause because they indicate conscientious scruples against imposition of death penalty—Due process—Equal protection of the law.

7. Defendant's contention, that due process was violated at the trial by excusing jurors for cause merely because they indicated conscientious scruples against the imposition of the death penalty, in that this prevented the accused from being tried by a jury which was a cross section of the community, was *Held* to be without merit.

8. Defendant's further argument, that the excusing of jurors for cause because of conscientious scruples violates the Due Process Clause of the Fourteenth Amendment, since a jury has absolute discretion in the fixing of the penalty and could conceivably act differently in different cases, was likewise *Held* to be without merit.

9. Defendant's contention, that there is an equal protection violation inherent in the present jury system, was *Held* to be without merit.

Mr. Justice ROBERTS filed a dissenting opinion.

Mr. Justice POMEROY filed a dissenting opinion, in which Mr. Justice ROBERTS joined.

Mr. Chief Justice BELL took no part in the consideration or decision of this case.

Argued January 19, 1971. Before JONES, EAGEN, O'BRIEN, ROBERTS, POMEROY and BARBIERI, JJ.

Appeal, No. 384, Jan. T., 1970, from judgment of sentence of Court of Common Pleas, Trial Division, of Philadelphia, April T., 1968, No. 888, in case of Commonwealth of Pennsylvania v. William Matthews. Judgment affirmed.

Indictment charging defendant with murder. Before DOTY, J.

Verdict of guilty of murder of the first degree; post-trial motions by defendant denied, and judgment of sentence entered. Defendant appealed.

Abraham J. Brem Levy, for appellant.

Louis A. Perez, Jr., Assistant District Attorney, with him *Milton M. Stein,* Assistant District Attorney, *James D. Crawford,* Deputy District Attorney, *Richard A. Sprague,* First Assistant District Attorney, and *Arlen Specter,* District Attorney, for Commonwealth, appellee.

OPINION BY MR. JUSTICE EAGEN, December 29, 1971:

William Matthews, sentenced to life imprisonment following his conviction by a jury of murder in the first degree, appeals from the judgment of sentence.

The sufficiency of the trial evidence to sustain the verdict is not questioned, nonetheless, we have studied the record and are satisfied the evidence was ample to establish Matthews' guilt of murder in the first degree beyond a reasonable doubt.

From the evidence, the jury was warranted in finding that Matthews, on February 23, 1968, acting in concert with his nephew, James Williams, and a friend, James Jackson, robbed Randolph Butts in Philadelphia and during the perpetration of the robbery Butts was stabbed four times by one of the felons, causing injury which resulted in Butts' death.

Appellant cites several alleged errors during the prosecution proceedings which he asserts require a new trial. We conclude these assignments of error are without merit for the reasons that follow.

During the investigation of the crimes involved, the police apprehended and questioned Williams, who admitted having participated in the commission of the robbery, and accused Matthews and Jackson of also having participated and informed the police that Matthews had hidden the knife used in the stabbing in an apartment at a certain address. Based on this information, an investigating officer caused a search warrant to issue for the apartment. The complaining affidavit, signed by a police detective, Verbrugghe, stated the following: "On Fr. 2-23-68 about 11:00 p.m. Randolph Butts 40-N., 4-38 Green St., was taken from the highway 3856 Haverford Ave. to the Presbyterian Hosp., and pronounced dead from stab wounds of the back. Investigation disclosed that James Williams 18-N., res. 3856 Haverford Avenue took part in the robbery of Randolph Butts. James Williams stated that William Matthews 18-N., 3856 Haverford and James Jackson 19-N., 4422 Brown St., had stabbed Randolph Butts and hid the knife in the 3rd floor apartment [rear] of 3856 Haverford Ave." The warrant described the property sought as "one pocket knife" and bloody clothing worn by William Matthews on Friday, February 23, 1968.

Upon arriving at 3856 Haverford Avenue at 12:30 a.m., on February 24th, (the apartment of appellant's sister), the police took appellant into custody, placed him under arrest, and pursuant to the warrant seized an eight-inch kitchen knife (otherwise described as a "butter knife").

Initially, appellant suggests that the affidavit upon which the search and seizure warrant was based lacks the requisite information for a finding of probable cause.

The foundation of the law of search and seizure is the Fourth Amendment, which is binding on the states under the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684 (1961). The Fourth Amendment in pertinent part provides: "No warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." And it is now well established that a magistrate may not constitutionally issue a search warrant until he is furnished with information sufficient to persuade a reasonable man that probable cause for the search exists. *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584 (1969); *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509 (1964). The purpose of requiring this information is to give the magistrate the opportunity of knowing and weighing the facts and determining objectively for himself the need for invading a person's privacy in order to enforce the law. *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191 (1948). His decision must be based solely on the information brought to his attention. *Aguilar v. Texas*, supra; *Giordenello v. United States*, 357 U.S. 480, 78 S. Ct. 1245 (1958). He must render his decision based on a commonsense reading of the entire affidavit. *United States v. Ventresca*, 380 U.S. 102, 85 S. Ct. 741 (1965); *Commonwealth v. Payton*, 212 Pa. Superior Ct. 254, 243 A. 2d 202 (1968). Thus

inclined to give false information about himself, or his uncle, the appellant.

Moreover, his recitation of the manner in which the crime was committed was corroborated by the police investigation, since it was clear that a murder had been committed and it occurred as a result of stab wounds, as the informer stated, leading to the conclusion he had first-hand information.

The appellant's next contention is that the kitchen knife seized and put in evidence as the murder weapon should have been suppressed because of the "slipshod manner in which Detective Verbrugghe approached his duties when he described the knife he was looking for as a pen knife; whereas he actually confiscated a silver kitchen knife."

The affidavit stated that the item to be seized was merely a knife, but the warrant limited the description to "one pocket knife". According to testimony elicited during the suppression hearing below, when the detectives entered the apartment where appellant was staying, they asked Valerie Williams (an occupant of the apartment) where the "knife" used in the killing was. She pointed it out in a pan of water under the kitchen table and, as previously noted, the knife was a kitchen knife rather than a "pocket knife". Thus it is clear that the knife seized does not exactly match the description given in the warrant.

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no warrant shall issue, but upon probable cause, supported by Oath or affirmation, *and particularly describing the place to be searched, and the persons or things to be seized.*" [Emphasis added.]

The United States Supreme Court in the case of *Marron v. United States*, 275 U.S. 192, 48 S. Ct. 74 (1927), discussed the Fourth Amendment requirement of particularity in the following terms: "The requirement that warrants shall particularly describe the things to be seized *makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officers executing the warrant.*" [Emphasis added.] *Id.* at 196, 48 S. Ct. at 76.

It cannot be disputed that general or exploratory searches through which officers merely hope to discover evidence of *any* kind of *any* wrongdoing are not constitutionally permissible. The search must be one directed in good faith towards the objects specified in the warrant. Cf. *United States v. Rabinowitz*, 339 U.S. 56, 70 S. Ct. 430 (1950); *United States v. Lefkowitz*, 285 U.S. 452, 52 S. Ct. 420 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S. Ct. 153 (1931).

We are convinced the search in this case was not "exploratory", but rather one directed in good faith towards the object specified in the warrant. To rule otherwise, merely because the warrant specified a "pocket knife" whereas "a kitchen knife" was seized would be hypertechnical and contrary to the common-sense approach mandated in *United States v. Ventresca*, supra. Cf. also, *State v. Pietraszewski*, 285 Minn. 212, 172 N.W. 2d 758 (1969). Moreover, in this connection, we note that several courts have ruled that where the items to be seized are as precisely identified as the nature of the activity permits and an exact description is virtually impossible, the searching officer is only required to describe the general class of the item he is seeking. For example, see *James v. United States*, 416 F. 2d 467 (5th Cir. 1969), cert denied 397 U.S. 907, 90

S. Ct. 902 (1970); *United States v. Melville*, 309 F. Supp. 822 (S.D. N.Y. 1970); and, *United States v. Robinson*, 287 F. Supp. 245 (N.D. Ind. 1968).

Appellant next contends constitutional due process was violated at trial by the evidentiary use of a confession he made to the police.

Matthews testified that the confession was coerced through threats of physical violence and that his request for a lawyer during the period of police questioning was ignored. However, this testimony was specifically contradicted by the police officer to whom the confession was given. This officer denied the existence of any coercion and stated no questioning occurred until after Matthews had been fully informed of his rights as mandated by "Miranda", and indicated he understood his rights and was willing to make a statement without the assistance of legal counsel. Under the circumstances, the credibility of Matthews' testimony was for the fact-finders below, and we find nothing in the record to cause us to interfere with their rejection of his testimony. Cf. *Commonwealth v. Abrams*, 443 Pa. 295, 278 A. 2d 902 (1971); and *Commonwealth ex rel. Joyner v. Brierley*, 429 Pa. 156, 239 A. 2d 434 (1968).

Appellant next asserts the trial court committed error in refusing a specific request to instruct the jury on voluntary manslaughter, and also in failing to submit to the jury such a finding as a possible verdict. Since there was no evidence which pointed in the slightest degree to the offense of manslaughter, the court's action did not constitute error. *Commonwealth v. LaRue*, 381 Pa. 113, 112 A. 2d 362 (1955); and *Commonwealth v. Flax*, 331 Pa. 145, 200 A. 632 (1938).

Appellant next contends due process was violated at trial by excusing jurors for cause merely because they indicated conscientious scruples against the impo-

sition of the death penalty, because this prevented the accused from being tried by a jury which was a cross section of the community. This contention was considered and rejected in *Commonwealth v. Speller*, 445 Pa. 32, 282 A. 2d 26 (1971), and we stand on our decision in that case. See also *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788 (1968); and, *Commonwealth v. Roach*, 444 Pa. 368, 282 A. 2d 382 (1971).

In this connection, appellant advances another argument not considered in *Speller*, namely, that the excusing of jurors for cause because of conscientious scruples violates the Due Process Clause of the Fourteenth Amendment, since a jury has absolute discretion in the fixing of the penalty and "could conceivably act differently in different cases." *Giaccio v. Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518 (1966), is cited support of this position.

Giaccio is inapposite. Therein the court ruled unconstitutional a Pennsylvania statute permitting a jury to place the costs on a defendant charged with a misdemeanor even though it found him *not* guilty of the crime. The thrust of the decision was that the statute was too vague and lacked sufficient standards to enable the accused to protect himself against arbitrary and discriminatory imposition of costs. Herein, the proscribed act is the taking of another human life, and there is nothing vague about that.

Furthermore, in speaking for the majority in *Giaccio*, the late Mr. Justice BLACK disposed of the contention now under discussion when he said: "In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." *Id.* at 405, n. 8, 86 S. Ct. at 522, n. 8.

Finally, we note that the United States Supreme Court in the recent case of *McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454 (1971), while speaking on this very issue rejected the claim that there was a due process violation. Therein the Court pertinently stated: "We consider first McGautha's and Crampton's common claim; that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable. To fit their arguments within a constitutional frame of reference petitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it sees fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law. Despite the undeniable surface appeal of the proposition, we conclude that the courts below correctly rejected it." *Id.* at 196, 91 S. Ct. at 1461. The Court went on to state: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious

that no jury would need." *Id.* at 207-08, 91 S. Ct. at 1467-68.

Appellant also urges that there is an equal protection violation inherent in the present jury system. This contention is totally devoid of merit. Generally speaking, the equal protection clause requires a government to treat all those standing in the same position equally, i.e., a government cannot discriminate against a class or group of individuals. In cases such as here involved, there is no discrimination—all those who are found guilty of murder in the first degree can either have their punishment fixed at death or life imprisonment, and that determination rests with the jury *based on the facts of each case.* There is no apparent, or invidious discrimination against an individual, a group, or a class since the facts of each case are different and the jury makes its determination of the degree of guilt based solely on the facts in the case before it.

Finally, it is urged the trial court favored the Commonwealth and failed to act fairly and impartially throughout the proceedings. Our examination of the record fails to persuade us that there is any merit in this contention.

Judgment affirmed.

Mr. Chief Justice BELL took no part in the consideration or decision of this case.

DISSENTING OPINION BY MR. JUSTICE ROBERTS:

I join the dissenting opinion of Mr. Justice POMEROY and also wish to add two additional brief observations.

First, many of our cases decided prior to *Commonwealth v. Flax,* 331 Pa. 145, 200 Atl. 632 (1938), accepted without question the proposition "that on a trial for murder where there is no evidence which in the

remotest degree points to the offense of manslaughter, the court commits no error in instructing the jury that a verdict of guilty of manslaughter would not be warranted." *Commonwealth v. Yeager*, 329 Pa. 81, 85, 196 Atl. 827, 830 (1938); accord *Commonwealth v. Carroll*, 326 Pa. 135, 191 Atl. 610 (1937); *Commonwealth v. Crossmire*, 156 Pa. 304, 27 Atl. 40 (1893); *Commonwealth v. Buccieri*, 153 Pa. 535, 26 Atl. 228 (1893).

The subsequent restatement of that rule seems to have been made without any apparent awareness of the substantive difference between the principle of *Yeager*, supra, and *Flax* and the cases decided thereafter.

Mr. Justice POMEROY, in his dissent, has focused on the denial of equal protection and the basic weakness in the rule which the majority here again reiterates. I believe we should not let this case pass without correction.

Secondly, it is of course unarguable that voluntary manslaughter is a lesser included offense in an indictment for murder. The jury should be so instructed. Furthermore, the jury should be advised that a verdict of voluntary manslaughter is one of the verdicts returnable under a murder indictment. The failure to do so obviously creates many potentials for incomplete, unfair, and unequal considerations in the deliberations of the jury and the verdict and treatment accorded the accused.

DISSENTING OPINION BY MR. JUSTICE POMEROY:

Among appellant's several assignments of error is the trial court's refusal of a specific request for an instruction to the jury on the elements of voluntary manslaughter as being one of the possible verdicts the jury may return in a murder case. The opinion of this Court summarily rejects this assignment on the ground that ". . . there was no evidence which pointed in the

slightest degree to the offense of manslaughter". There is, admittedly, precedential support for this conclusion, and it reflects the long standing practice in our criminal courts. Upon reflection, however, I believe that logic and fairness mandate a different result, and I therefore respectfully dissent.

Because of the brevity of the majority's treatment of this issue, it may be helpful to summarize the current status of the law with respect to (1) jury instructions on voluntary manslaughter, and (2) the return by the jury of a voluntary manslaughter verdict in trials for murder wherein there has been no evidence to support such a verdict.

While it is considered felonious, voluntary manslaughter is the least culpable form of homicide included within a murder indictment. Thus, when considering the degree of culpability of an individual being tried under such an indictment, a jury may return a voluntary manslaughter verdict if it finds that the killing, although intentional, was committed without malice; that is, the accused may be shown to have been acting under the influence of sudden passion which was caused by legally adequate provocation that placed him beyond the control of reason.[1] See e.g., *Commonwealth v. Walters*, 431 Pa. 74, 244 A. 2d 757 (1968); *Commonwealth v. Paese*, 220 Pa. 371, 69 Atl. 891

[1] The difference in culpability between first or second degree murder on the one hand and voluntary manslaughter on the other is reflected in the punishments which accompany conviction of these respective offenses. Thus, a conviction for first degree murder carries with it a sentence of death or life imprisonment. Sanctions that may properly be imposed upon one found guilty of second degree murder include imprisonment for a term not exceeding twenty years and a fine up to ten thousand dollars. Act of June 24, 1939, P. L. 872, §701, 18 P.S. §4701. Punishment for voluntary manslaughter, in contrast, may not exceed twelve years imprisonment and six thousand dollars fine. Act of June 24, 1939, *supra*, §703, 18 P.S. §4703.

wealth's interest in keeping from the jury instructions which might lead a jury to return a less harsh verdict or perhaps even a logically unjustified verdict, and the method by which the Commonwealth seeks to vindicate that interest. It would seem that the interest of the Commonwealth is adequately protected by the fact that the trial judge may, indeed should, advise the jury that, where no evidence of provocation or passion has been presented, a verdict of voluntary manslaughter would not be warranted. *Commonwealth v. Yeager, supra.*[2]

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[2] An example of an acceptable jury charge in the circumstances of the instant case can be found in Laub, *Pennsylvania Trial Guide*, §618.5: "Under the law, you are entitled to bring in a verdict of voluntary manslaughter. That is a question for you and we may not interfere with your judgment in the matter. In our opinion there is no evidence of any sufficient cause of provocation which, if this were a malicious killing, would reduce it to voluntary manslaughter, but that is our opinion merely and it is not binding upon you. It is for you and you alone to say whether this was a case of voluntary manslaughter and we have no right to decide that issue. One of the permissible verdicts in cases of this type is a verdict of guilty of voluntary manslaughter and the court has no right to deprive you of the privilege of so declaring if you wish."

I would distinguish this type of admonition from what I believe to be improper judicial comments which suggest a verdict of guilty or not guilty, or directly express an opinion on the accused's guilt or innocence. An instruction such as suggested above merely suggests to the jury that the evidence is insufficient to show passion or provocation. In my view, such a jury charge conforms with the *American Bar Association Standards Relating to Trial by Jury*, which permit the court to comment on the evidence provided that the jury is ". . . clearly and unequivocally instructed that it is the exclusive judge of the facts . . . and that it is not bound by the comments of the court." §4.7 (Approved Draft, 1968). In no way does the above proposed instruction imply that a not guilty verdict would be improper, nor could the jury infer from such a comment that a second or first degree murder verdict would be impermissible; the jury remains untainted by any judicial suggestion of the *ultimate* guilt (or degree of guilt) or innocence of the accused.

It has been said that our ". . . constitutional guaranties of due process and equal protection both [call] for procedures in criminal trials which allow no invidious discriminations betwen persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equity before the bar of justice in every American court." *Griffin* v. *Illinois*, 351 U.S. 12, 17, 100 L. Ed. 891, 898 (1956). Seeking to apply this principle to the situation before us, I am of the view that as long as we allow juries the latitude we do in homicide cases, as above set forth, criminal defendants must be treated equally by informing all juries of the verdicts they have the power to return. This means that the trial court should not have discretion whether or not to instruct on the elements of voluntary manslaughter; it should be obliged to do so in every murder trial, but with proper cautionary admonition such as that set forth in footnote 2.

I would vacate the judgment of sentence and remand for a new trial.

Mr. Justice ROBERTS joins in this dissenting opinion.

APPENDIX E

OTHER STATE COURTS ADHERING TO THE RULE STRUCK DOWN BY THE LOWER COURT

In the following states, the jury has the undisputed power to render a manslaughter verdict on any murder indictment, but the court may refuse to charge on manslaughter or remove manslaughter from the jury's consideration where there is no evidence to support a manslaughter verdict.

States in the First Circuit

Maine

State *v.* Peak, 193 A.2d 1 (1963)
State *v.* Heald, 292 A.2d 200 (1972)
State *v.* Lund, 266 A.2d 869 (1970)

Massachusetts

Commonwealth *v.* Rembiszewski, 293 N.E.2d 919 (1973)
Commonwealth *v.* Campbell, 226 N.E.2d 211 (1967)
Commonwealth *v.* Costa, 274 N.E.2d 802 (1971)

Rhode Island

State *v.* Saccoccio, 147 A. 878 (1929)
State *v.* Prescott, 40 A.2d 721 (1944)
State *v.* Bradshaw, 221 A.2d 815 (1966)

New Hampshire

State *v.* Nelson, 175 A.2d 814 (1961), cert. denied, 369 U.S. 879 (1962)

States in the Second Circuit

New York

People *v.* Richardson, 36 A.D.2d 25, 27 (1971)
People *v.* Mussenden, 308 N.Y. 558, 563 (1955)
People *v.* Brown, 37 A.D.2d 685 (1971)

Connecticut

State *v.* Cianflone, 120 A. 347 (1923)
State *v.* Chapman, 130 A. 899 (1925)

States in the Third Circuit

Delaware

State *v.* Carey, 178 A. 877 (1935)
Bantum *v.* State, 85 A.2d 741 (1952)

New Jersey

State *v.* Young, 51 A. 939 (1902)
Commonwealth *v.* Trantino 209 A.2d 117 (1965), cert. denied, 382 U.S. 993, rehearing denied, 383 U.S. 922 (1965)

States in the Fourth Circuit

West Virginia

State *v.* Lewis, 57 S.E.2d 513 (1950)
State *v.* Stevenson, 172 S.E. 533 (1933)

South Carolina

State *v.* Edwards, 10 S.E.2d 587 (1940)
State *v.* Gardner, 64 S.E.2d 130 (1951)
State *v.* Britt, 111 S.E.2d 669 (1959)
State *v.* Norris, 168 S.E.2d 564 (1969)

Virginia

Bell *v.* Commonwealth, 189 S.E. 441 (1937)
Little *v.* Commonwealth, 175 S.E. 767 (1934)
Thacher *v.* Commonwealth, 154 S.E.2d 130 (1967)
Taylor *v.* Commonwealth, 43 S.E.2d 906 (1947)

Maryland

Gaskins *v.* State, 272 A.2d 413, cert. denied, 404 U.S. 1040 (1971)
McFadden *v.* State, 231 A.2d 910 (1967)

North Carolina

State *v.* Lea, 193 S.E.2d 383 (1972)
State *v.* Barnwell, 194 S.E.2d 63 (1973)
State *v.* Hairston, 185 S.E.2d 633 (1972)

States in the Fifth Circuit

Alabama

Thomas *v.* State, 28 So. 591 (1900)
Hunt *v.* State, 33 So. 329 (1903)
Green *v.* State, 122 So.2d 520 (1960)
Houlton *v.* State, 48 So.2d 7 (1950)

Georgia

Henderson *v.* State, 179 S.E.2d 76 (1970)
Banks *v.* State, 182 S.E.2d 106 (1971)
Varnum *v.* State, 186 S.E.2d 485 (1971)
Andrews *v.* State, 152 S.E.2d 388 (1966)

Mississippi

Ruffin *v.* State, 85 So.2d 82 (1956)
Calicoat *v.* State, 95 So.318 (1923)
Dover *v.* State, 227 So.2d 296 (1969)

Texas

Lucky *v.* State, 495 S.W.2d 919 (1973)
Lee *v.* State, 504 S.W.2d 504 (1974)

States in the Sixth Circuit

Michigan

People *v.* Guin, 182 N.W.2d 103 (1970)
People *v.* Cowell, 205 N.W.2d 600 (1973)
People *v.* Allen, 197 N.W.2d 874 (1972)

Kentucky

Montague *v.* Commonwealth, 332 S.W.2d 543 (1960)
Pennington *v.* Commonwealth, 334 S.W.2d 407 (1961)
Stanley *v.* Commonwealth, 380 S.W.2d 71 (1965)

Ohio

State *v.* Carver, 283 N.E.2d 662, aff'd. 285 N.E.2d 26, cert. denied, 409 U.S. 1044 (1971)
State *v.* Muskus, 109 N.E.2d 15 (1953)

States in the Seventh Circuit

Illinois

People *v.* Marsh, 85 N.E.2d 715 (1949)
People *v.* Gonzales, 239 N.E.2d 783 (1968)
People *v.* Handley, 282 N.E.2d 131 (1972)

Indiana

(felony-murder cases only)
Mack *v.* State, 180 N.E. 279 (1932)
Barker *v.* State, 150 N.E.2d 680 (1958)
Dull *v.* State, 180 N.E.2d 523 (1962)

Wisconsin

Sweda *v.* State, 240 N.W. 369 (1932)
Brook *v.* State, 123 N.W.2d 535 (1963)
Commodore *v.* State, 147 N.W.2d 283 (1967)

States in the Eighth Circuit

Nebraska

Wever *v.* State, 238 N.W. 736 (1931)

Iowa

State *v.* Woodmansee, 233 N.W. 725 (1930)
State *v.* Drosos, 114 N.W.2d 526 (1962)

North Dakota

State *v.* Haakenson, 213 N.W.2d 394 (1973)

Missouri

State *v.* Edwards, 486 S.W.2d 224 (1972)
State *v.* Ayers, 470 S.W.2d 534 (1971)

Minnesota

State *v.* Norton, 260 N.W. 502 (1935)

States in the Ninth Circuit

Hawaii

Territory *v.* Buick, 27 Haw. 28 (1923)
Territory *v.* Alcantara, 24 Haw. 197 (1918)
Territory *v.* Joaquin, 39 Haw. 221 (1952)

Montana

State *v.* Thomas, 413 P.2d 315 (1966)
State *v.* Fisher, 169 P. 282 (1919)
State *v.* Reagan, 210 P. 86 (1922)

Oregon

State *v.* Cox, 505 P.2d 360 (1973)

Washington

State *v.* Aiken, 434 P.2d 10 (1967), vacated, Wheat *v.* Washington, 392 U.S. 652
State *v.* Huff, 458 P.2d 180 (1969)

California

People *v.* Gaulden, 111 Cal. Rptr. 803 (1974)
People *v.* Rhinehard, 507 P.2d 642 (1973)

Idaho

State *v.* Owen, 253 P.2d 203 (1953)
State *v.* Beason, 506 P.2d 203 (1973)

Arizona

State *v.* Young, 508 P.2d 51 (1973)
State *v.* Jones, 505 P.2d 251 (1973)

Nevada

Graves *v.* State, 439 P.2d 476, cert. denied, 393 U.S. 919 (1968)

States in the Tenth Circuit

Colorado

English *v.* People, 497 P.2d 691 (1972)
Bertalotto *v.* People, 488 P.2d 1100 (1971)
Ferrin *v.* People, 433 P.2d 108 (1967)

Kansas

State *v.* Hoy, 430 P.2d 275 (1967)
State *v.* Noble, 264 P.2d 479 (1953)
State *v.* Hinkle, 479 P.2d 841 (1971)

Oklahoma

Abel *v.* State, 507 P.2d 569 (1973)

Utah

State *v.* Mitchell, 278 P.2d 618 (1955)

SUPREME COURT, U. S.
74-573
Supreme Court, U. S.
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IN THE

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OCTOBER TERM, 1974 No. 573

ROBERT L. JOHNSON, Superintendent
and
DISTRICT ATTORNEY OF PHILADELPHIA
COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

WILLIAM MATTHEWS, Respondent

PETITIONER'S REPLY MEMORANDUM

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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Petitioner's Reply Memorandum

In respondent's brief opposing certiorari, extensive treatment was afforded decisions of the Supreme Court of Pennsylvania. Because the Commonwealth originally reserved the issue (see petition for writ of certiorari at 19), some confusion may have occurred concerning the precise nature of the Pennsylvania practice held unconsti-

tutional by the court below. This is relevant to this Court's decision as to the grant of certiorari only insofar as a clear understanding of the Pennsylvania practice is necessary to determine whether there is a genuine conflict between the Court of Appeals' decision and the other authorities cited in the Commonwealth's petition. A brief review of the Pennsylvania caselaw[1] is therefore submitted to show that the decisional conflicts previously asserted are not rendered illusory by some anomalous quirk of state court practice.

In Pennsylvania, as in virtually every other jurisdiction, voluntary manslaughter is considered a lesser included offense in a murder indictment.[2] *Commonwealth* v. *Gable*, 7 S & R 423 (1821); *Commonwealth* v. *Kellyon*, 278 Pa. 59, 122 A. 166 (1923). Thus, juries have the power to render a manslaughter verdict where the charge is murder.

Therefore, if there was any evidence, however slight, which would support a manslaughter verdict, the court was required to charge the jury on the lesser offense. However, where there was no evidence whatever tending to reduce the crime to manslaughter, no such charge was required. *Commonwealth* v. *Buccieri*, 153 Pa. 535, 26 A. 228 (1893); *Commonwealth* v. *Crossmire*, 156 Pa. 304, 27 A. 40 (1893); *Commonwealth* v. *Eckerd*, 174 Pa. 137, 34 A. 305 (1896); *Commonwealth* v. *MacMurray*, 198 Pa. 51, 47 A. 952 (1901); *Commonwealth* v. *Sutton*, 205 Pa. 605, 55 A. 781 (1903); *Commonwealth* v. *Curcio*, 216 Pa. 380, 65 A. 792 (1907); *Commonwealth* v. *LeGrange*, 227 Pa. 368, 76 A. 63 (1910); *Commonwealth* v. *Morrison*, 266 Pa. 223, 109 A. 878 (1920); *Commonwealth* v. *Pava*, 268 Pa. 520, 112 A. 103 (1920); *Commonwealth* v. *Spardute*, 278 Pa. 37, 122 A. 161 (1923); *Commonwealth* v. *Robinson*,

[1] Prior to May 2, 1974.

[2] Involuntary manslaughter is not a lesser included offense. **Hilands v. Commonwealth**, 114 Pa. 372, 6 A.267 (1886); **Commonwealth v. Weinberg**, 276 Pa. 255, 120 A.402 (1923).

305 Pa. 302, 157 A. 689 (1931); *Commonwealth* v. *Yeager*, 329 Pa. 81, 196 A. 827 (1938); *Commonwealth* v. *Flax*, 331 Pa. 145, 200 A. 632 (1938); *Commonwealth* v. *LaRue*, 381 Pa. 113, 112 A.2d 362 (1955); *Commonwealth* v. *Foster*, 364 Pa. 288, 72 A.2d 279 (1950); *Commonwealth* v. *Parillard*, 421 Pa. 571, 220 A.2d 807 (1966); *Commonwealth* v. *Dews*, 429 Pa. 555, 239 A.2d 382 (1968); *Commonwealth* v. *Corbin*, 432 Pa. 551, 247 A.2d 584 (1968); *Commonwealth* v. *Heckathorn*, 429 Pa. 534, 241 A.2d 97 (1968); *Commonwealth* v. *Banks*, 447 Pa. 356, 285 A.2d 112 (1971); *Commonwealth* v. *Kenney*, 449 Pa. 562, 297 A.2d 794 (1972); *Commonwealth* v. *Jones*, 450 Pa. 442, 299 A.2d 288 (1973); *Commonwealth* v. *Cannon*, 453 Pa. 389, 309 A.2d 384 (1973).

The typical case in which the charge was never required was the clear felony-murder situation, in which malice was supplied by the intent to commit the underlying felony, so evidence of passion and provocation are irrelevant. *Brown* v. *Commonwealth*, 76 Pa. 319, 339 (1874); *Clark* v. *Commonwealth*, 123 Pa. 555, 575, 16 A. 795, 799 (1888); *Commonwealth* v. *Meleskie*, 278 Pa. 383, 123 A. 310 (1924); *Commonwealth* v. *Davis*, 449 Pa. 468, 297 A.2d 817 (1972), *cert. denied*, 414 U.S. 836 (1973). In this regard, the Supreme Court of Pennsylvania noted:

> Barbarous indeed would be a law permitting the plea of provocation and hot blood to a man who when attempting rape flies into a frenzy and kills his victim because she forcibly defends herself . . . But no such rule exists in our criminal jurisprudence.

Commonwealth v. *Meleskie*, *supra* at 386, 123 A. at 311.

The final series of cases comprising the "Pennsylvania practice presently under review"[3] cite the long-

[3] Opinion of the court below, Commonwealth's petition for writ of certiorari, Appendix B, at 34.

established common law doctrine that a jury verdict on a lesser-included offense will not be disturbed because the evidence clearly shows the defendant to be guilty of the higher grade of crime. Nine such cases have been found: *Commonwealth* v. *Kellyon*, 278 Pa. 59, 122 A. 166 (1923); *Commonwealth* v. *Arcuroso*, 283 Pa. 84, 128 A. 668 (1925); *Commonwealth* v. *Steele*, 362 Pa. 427, 66 A.2d 825 (1949); *Commonwealth* v. *Frazier*, 411 Pa. 195, 191 A.2d 369 (1963); *Commonwealth* v. *Frazier*, 420 Pa. 209, 216 A.2d 337 (1966) (on appeal from retrial); *Commonwealth* v. *Cooney*, 431 Pa. 153, 244 A.2d 651 (1968); *Commonwealth* v. *Dennis*, 433 Pa. 525, 252 A.2d 671 (1969); *Commonwealth* v. *Harry*, 437 Pa. 532, 264 A.2d 402 (1970); *Commonwealth* v. *Hill*, 444 Pa. 323, 281 A.2d 859 (1971); *Commonwealth* v. *Butcher*, 451 Pa. 359, 304 A.2d 150 (1973).[4] The first and leading case in this series, *Commonwealth* v. *Kellyon*, *supra*, established the principle and advanced most of the theoretical framework cited by later cases to support the rule. This theoretical framework did not rest on any novel analysis by the court. Instead it relied solely on the well-settled common law doctrine of lesser-included offenses. As precedent it cited no idiosyncratic Pennsylvania jurisprudence, but a well-recognized treatise on English and American common law.[5]

[4] Both **Commonwealth v. Nelson**, 396 Pa. 359, 152 A.2d 913 (1959), and **Commonwealth v. Hoffman**, 439 Pa. 348, 266 A.2d 726 (1970), often cited as examples of this rule, contain similar language. However, in each of these cases the deceased died of wounds incurred in a fight in which he was the original and continuing aggressor. Thus, the jury in either case might justifiably have found provocation and hot blood.

[5] 13 Ruling Case Law 757 § 65 (1916). Two later cases, **Commonwealth v. Frazier**, (420 Pa.), **supra**, and **Commonwealth v. Butcher**, **supra**, advert to an additional reason for the rule: as the prohibition against double jeopardy would prevent reversal and retrial for the higher offense, the only alternatives are to affirm the judgment of the lower degree of crime or to discharge the criminal altogether. As the latter course would yield an abhorrent result by compounding the lenient with the ridiculous, appellate courts must affirm even apparent compromise or sympathy verdicts. Suffice it to say that this is not so much a legal precept as a recognition of the reality existing in every jurisdiction subject to the United States Constitution.

No additional cases lurk in the cobwebs to distinguish the Pennsylvania practice under consideration from the practice in the other jurisdictions cited to this Court in the Commonwealth's petition for writ of certiorari.[6] A comprehensive review of the cases belies the suggestion of any bizarre state practice. Thus the clear conflict between the holding of the court below and other jurisdictions is genuine, and capable of resolution only by this Court.

Respectfully submitted,

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[6] Similarly the notion of "unrestricted discretion" and capricious conduct by trial courts is based upon nothing more than an imaginative extrapolation of the above-cited cases.